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When Are Three Federal Judges Required--An Inquiry into the Meaning of Section 266 of the Judicial Code

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WHEN ARE THREE FEDERAL JUDGES REQUIRED?

AN INQUIRY INTO THE MEANING OF SECTION 266[1] OF THE JUDICIAL CODE

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SECTION 266 of the United States Judicial Code[2] provides that before a federal district court may issue an interlocutory injunction suspending or restraining, upon the ground of unconstitutionality, the enforcement of any state statute or order of a state administrative board acting pursuant to state statute by restraining the action of a state officer in the enforcement of such statute or order, the matter must be heard and determined by a tribunal of three judges, at least one of whom must be a justice of the Supreme Court of the United States or a circuit judge. It is the purpose of this article to consider the application of this section, and to discuss the construction placed upon it by the Supreme

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[1]Section 266 is set out in full in footnote 2, below. In this article, the Urgent Deficiencies Act will also be included. The latter provides for procedure in the federal courts, in suits to restrain the enforcement of orders of the Interstate Commerce Commission, exactly like that provided in section 266 as regards state statutes or orders of state administrative boards. The Urgent Deficiencies Act has been extended by statute (Packers and Stockyards Act, sec. 316, 7 U.S.C.A. sec. 217, Mason's Code, tit. 7, sec. 217) to include proceedings brought to restrain or annul orders of the secretary of agriculture. Tagg Bros. & Moorhead v. United States, (1930) 280 U. S. 420, 50 Sup. Ct. 220, 74 L. Ed. 524. The Urgent Deficiencies Act is the Act of 1913, ch. 32, 38 Stat. 208, 219, 220, U. S. C. tit. 28, sec. 47, 28 U. S. C. A. sec. 47, Mason's Code, tit. 28, sec. 47. Section 238 Judicial Code, subsec. 4, 28 U. S. C. A. sec. 345, subsec. 4, Mason's Code, tit. 28, sec. 345, subsec. 4, provides for direct appeal to the Supreme Court of the United States from action of the statutory three-judge court required under the prior section, 28 U. S. C. A. sec. 47, Mason's Code, tit. 28, sec. 380. In the discussion, unless the distinction is made by using the term "act" in comparison to the term "section," all references to the "section" will include both.

[2]Section 266, Judicial Code, sec. 266, 36 Stat. 1162, 28 U. S. C. A. sec. 380, Mason's Code, tit. 28, sec. 380. The text of the section is as follows:

"No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State by restraining the action of

Court in the twenty-nine cases in which its meaning has been under consideration. The word "section" used in this discussion means section 266, and the word "Act" means the Urgent Deficiencies Act of similar import.[3]

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any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any Justice of the Supreme Court, or by any district court of the United States, or by any Judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and the attorney general of the State, and to such other persons as may be defendants in the suit; Provided, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and in good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit." (June 18, 1910, ch. 309, sec. 17, 36 Stat. 557.) The section was originally enacted in 1910; was amended to include order of state administrative boards or commissions, in 1913; and again in 1925, to require the presence of three judges at the final hearing. Mar. 3, 1911, ch. 231, sec. 266, 36 Stat. 1162; Mar. 4, 1913, ch. 160, 37 Stat. 1013; Feb. 13, 1925, ch. 229, sec. 1, 43 Stat. 938.

[3]See footnote 1.

The four points to which the discussion will be confined are: first, when are three judges required by the section; second, what restrictions are placed upon the power of any single justice or judge holding a district court to act in cases within the section; third, what provisions are made for review; and fourth, which courts have jurisdiction of cases within the section.

Some conception of the difficulty arising in the application of the section to actual practice may be gathered from a preliminary analysis of the twenty-nine cases. Twenty of these cases were claimed to be within the section. The Supreme Court held seven of these not within the section. Nine cases were claimed to be within the similar Urgent Deficiencies Act; four were held not to be within it.

The action of the lower federal courts was affirmed in nine cases, appeals were dismissed in two cases, and mandamus was denied in five cases, making a total of sixteen cases in which the lower court's action was sustained as proper and correct. On the other hand, it was reversed in eight cases, including action of the circuit court of appeals in one case, and mandamus was granted in six cases, making a total of fourteen cases in which the lower court's action was held improper and erroneous. In addition there were several cases which could have been decided by the single judge, where he needlessly called in two others, who referred the case back to him in two cases and continued to function in the other cases.[4]

1. In What Cases Are Three Judges Required?

The purpose and scope of section 266 are clearly and concisely set forth in one of the earliest decisions, the *Cumberland Case,*[5] as follows:

[4]Citations for the above statements have been omitted because of lack of space and because the cases are cited elsewhere. Where the same reasons apply, like omissions have been made below. [Ed.]

[5]Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Com'n, (1922) 260 U. S. 212, 43 Sup. Ct. 75, 67 L. Ed. 217. This was a suit by a telephone company to restrain the defendant commission from putting into effect a reduction of telephone rates, alleged to be confiscatory. A single judge granted a temporary restraining order, which he continued after a three-judge court had denied an interlocutory injunction. (See footnote 72 and text.) The Supreme Court granted mandamus to set aside the order of the single judge continuing the temporary restraining order. On this question, the Court said: "We are of the opinion that a single judge has no power, in view of section 266, to affect the operation of the order of the court constituted by the three judges granting or denying the interlocutory

"The legislation was enacted for the manifest purpose of taking away the power of a single United States judge, whether district judge, circuit judge, or circuit justice holding a district court of the United States, to issue an interlocutory injunction against the execution of a state statute by a state officer or of an order of an administrative board of the state pursuant to a state statute, on the ground of the federal unconstitutionality of the statute. Pending the application for an interlocutory injunction, a single judge may grant a restraining order to be in effect until the hearing of the application, but thereafter, so far as enjoining the state officers his powers are exhausted. The wording of the statute leaves no doubt that Congress was by provision ex industria seeking to make interference by interlocutory injunction from a federal court with the enforcement of state legislation regularly enacted and in the course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a circuit justice or judge, was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible unnecessary conflict between federal and state authority always to be deprecated."

The question of the power of the single federal judge or of the three judges to act in such cases is jurisdictional. It is "one of statutory power and jurisdiction, not one of judicial discretion or equitable consideration."[6]

It may be well to note here, that the section contemplates only restraint against legislative acts of the states, as may be seen

injunction applied for. To hold that he may grant a temporary injunction varying the order of the three judges would be to make the legislation a nullity and work the result Congress was at pains to avoid. . . . This is a question of statutory power and jurisdiction, not one of judicial discretion or equitable consideration." In Lawrence v. St. Louis-San Francisco Ry. Co., (1927) 274 U. S. 588, 47 Sup. Ct. 720, 71 L. Ed. 1219, a case within the concurrent jurisdiction of both federal and state courts, the railroad sought to set aside the refusal of the state commission to permit the railroad to remove a certain station. In sustaining the dismissal of the bill by the three-judge statutory court, the Court said: "Such railroads are subject to regulation by both the state and the United States. The delimitation of the respective power of the two governments requires often nice adjustment. The federal power is paramount. But public interest demands that, whenever possible, conflict betwen the two authorities and irritation be avoided. To this end it is important that the federal power be not asserted unnecessarily, hastily, or harshly. It is important also, that the demands of comity and courtesy, as well as of the law, be deferred to."

[6]See footnote 5. See also the Court's footnote, 1, in Ex parte Williams, (1928) 277 U. S. 267, 48 Sup. Ct. 523, 72 L. Ed. 877; and the court's footnote 1, in Ex parte Collins, (1928) 277 U. S. 565, 48 Sup. Ct. 585, 72 L. Ed. 990. The fact that the parties, and particularly the defendant, voluntarily consent to inaction of the state's officers, and thus dispense with, or consent to a formal temporary restraining order or interlocutory injunction, cannot divest the statutory court of jurisdiction. Brucker v. Fisher, (C.C.A. 6th Cir. 1931) 49 F. (2d) 759. See also footnote 10.

from a reading of the section and of the decisions. No express words in the section or any possible implication can afford any reasonable basis for extending the requirements of the section to cases where the acts of the executive or judiciary[7] departments of the state, as such, are sought to be restrained. And a legislative act, for the purpose of determining the applicability of the section, includes orders[8] of an administrative board of a state acting under and pursuant to state statute.

It may be well also to define and enumerate the kinds of restraint by injunction discussed herein and in the cases cited. Three kinds of injunctions are discussed herein, although an additional label is sometimes used in the books and in the cases. The first kind of restraint is the temporary restraining order, which is the summary, immediate restraint imposed by order of the court, ordinarily the single district judge before whom the case first appears for consideration and action. This kind of restraint is often, and in contemplation of the section may be, granted ex parte by the single judge. The second kind is the interlocutory injunction. This is the restraint imposed and allowed only after a hearing and argument of counsel, either oral or by brief. Under the section this relief can be allowed only by the three-judge court. When granted, the effect of the interlocutory injunction is to restrain the state during the time between the hearing on the application for interlocutory injunction and the final hearing when the case is finally determined and a permanent decree is granted or denied. The third kind of restraint is the permanent injunction, which likewise can be granted, under the terms of the section, only by three judges. A fourth name is sometimes used, i.e. preliminary injunction, but this is not, in fact, the name for a fourth kind of restraint, but is used rather loosely to designate either the temporary restraining order or the interlocutory injunction. In this discussion only the first three terms will be used.

[7]"There arises the objection that no ground for equitable interference by the Courts of the United States is shown by the bill. The only injury alleged is the result of the suit in the state courts. So far as appears that result will ensue only upon a decision against the appellant. It is an odd ground for an injunction against a suit that the suit may turn out against the party sued." Northport Power & Light Co. v. Hartley, (1931) 283 U. S. 568, 51 Sup. Ct. 581, 75 L. Ed. 811.

[8]The question of what are orders within the meaning of the section is discussed below. As to the question of whether legislative, rather than executive or judicial acts of a state are within the section, see footnotes 7 and 24 and text.

A. *The Function of the Plaintiff in Determining Whether the Section Shall Apply* — In the first instance, it is the plaintiff, or the complainant as he is sometimes called, who determines whether the case will lie within the section. He alone controls,[9] for he decides what relief he is seeking. Upon the relief sought depends the question whether the section will apply. The controlling feature is whether or not an interlocutory injunction on the ground of unconstitutionality is sought and pressed. If all the other elements[10] necessary to invoke the section are present, the plaintiff's application for such relief, or its absence, is the deciding factor. Where, given such other elements, the plaintiff seeks an interlocutory injunction, on such ground, the section will apply; if he does not seek such relief, the section will not apply.[11] Nor does the section apply where, having asked for such relief in his original papers, the plaintiff abandons such

[9]"The plaintiff is given an election. He may either make application for an interlocutory injunction, which must be heard by three judges, in which case the final hearing must be before a like court with appeal directly to this court, or he may not press an application for an interlocutory injunction, in which case the final hearing may be before a single judge, whose decision may be reviewed by the circuit court of appeals and this court under other applicable provisions of the judicial code." Per Hughes, C. J., in Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71. See also discussion, infra, under the heading, "Relief sought" and text at footnote 122. See also Brucker v. Fisher, (C.C.A. 6th Cir. 1931) 49 F. (2d) 759.

[10]For the distinction as to what interests of the plaintiff are sufficient to entitle him to intervene, but insufficient to entitle him to bring suit under the section, or under the Urgent Deficiencies Act, see, Alexander Sprunt & Son v. United States, (1930) 281 U. S. 249, 50 Sup. Ct. 315, 74 L. Ed. 832, in which the cases are collected. See also Pittsburgh & W. Va. Ry. Co. v. United States, (1930) 281 U. S. 479, 50 Sup. Ct. 378, 74 L. Ed. 980. Both the foregoing cases were under the Urgent Deficiencies Act. For a case under the section, see Massachusetts State Grange v. Benton, (1927) 272 U. S. 525, 47 Sup. Ct. 189, 71 L. Ed. 387. See also City of Chicago v. Chicago Rapid Transit Co., (1931) 52 Sup. Ct. 2, in which the city had been permitted to intervene below, in a suit to restrain an order of the Illinois Commerce Commission. The Supreme Court, in dismissing the appeal of the city from the order of the statutory court, said, "The Court is of the opinion that the City of Chicago has no separate standing which entitles it to appeal." That mere equitable grounds will not suffice, see Northport Power & Light Co. v. Hartley, (1931) 283 U. S. 568, 51 Sup. Ct. 581, 75 L. Ed. 811. On the other hand, the absence of equitable grounds is fatal to the right to sue. Massachusetts State Grange v. Benton, (1927) 272 U. S. 525, 47 Sup. Ct. 189, 71 L. Ed. 487. The absence of a state statute or order challenged as unconstitutional is also fatal. Northport Power & Light Co. v. Hartley, (1931) 283 U. S. 568, 51 Sup. Ct. 581, 75 L. Ed. 811.

[11]In re Buder, (1926) 271 U. S. 461, 46 Sup. Ct. 557, 70 L. Ed. 1036; Smith v. Wilson, (1927) 273 U. S. 388, 47 Sup. Ct. 385, 71 L. Ed. 699. See also footnote 9.

request, as by written or oral withdrawal in open court,[12] or abandons it by implication, as by waiving the question of unconstitutionality, or by conceding for purposes of a present motion that the statute or order originally challenged is constitutional.[13] In such a case the defendant cannot compel the plaintiff to continue, resume, or otherwise prosecute his original prayer for such relief. This is the decisive point of the *Hobbs Case*,[14] in which the Court said:

". . . The injunction . . . is not within the Judicial Code, section 266 as amended. . . . Three judges were not necessary, and the petitioners have no right to come here. . . . The judge was clearly right in treating the plaintiffs in the several suits as masters to decide what they would ask and in denying to the defendants, the petitioners, the power to force upon them a constitutional issue which at the moment they did not care to raise. The fact that the bills raised it did not prevent them from presenting a narrower claim and contenting themselves with the granting of that."

Nor is the question dependent upon whether the court believes the

[12]Hobbs v. Pollock, (1929) 280 U. S. 168, 50 Sup. Ct. 83, 74 L. Ed. 353. In this case certain insurance companies sued to restrain a state officer from enforcing an order of the state board relating to insurance rates, on the ground that the order was unconstitutional. The suit was brought in the federal court, and diversity of citizenship was alleged and shown. The bill prayed for a temporary restraining order, an interlocutory injunction, and a permanent injunction on the grounds of unconstitutionality of the order. Defendant moved the court to call in two other judges. Thereupon, the plaintiffs definitely stated that they abandoned their application for interlocutory injunction upon the ground of the unconstitutionality of the order, but demanded such relief on the usual equitable grounds. The single judge denied the motion of the defendants and granted an interlocutory injunction on the usual equitable grounds, the ground of unconstitutionality having been abandoned. Mandamus to compel the single judge to call in two other judges was denied by the Supreme Court. It may be observed that in this case the defendants were seeking to force the plaintiffs to demand the very thing from which the section protects the state, namely, an interlocutory injunction on the ground of unconstitutionality. Cf. Public Serv. Comm'n of Ind. v. Batesville Tel. Co., (1931) 52 Sup. Ct. 1, a case in which no interlocutory injunction was sought, and a single judge denied the relief sought; appeal was taken to the circuit court of appeals, which reversed the district court on the ground that the action of the commission was void because in excess of its powers under state law; on direct appeal to the Supreme Court from the circuit court of appeals, judgment of the latter court was affirmed because the Supreme Court dismissed the appeal. The Court said, "As in this case the circuit court of appeals did not decide against the validity of the order of the Public Service Commission upon the asserted federal grounds, but dealt with its validity solely under the state law, the appeal must be dismissed."

[13]Moore v. Fidelity & Deposit Co. (1926) 272 U. S. 317, 47 Sup. Ct. 105, 71 L. Ed. 273.

[14]See footnote 12.

statute or order challenged is constitutional. It has been held that where a judge decided that the section did not apply to the case before him because he was of the opinion that the statute challenged was constitutional, and intended so to hold in disposing of the case, his order of dismissal based upon such decision was made without jurisdiction and void.[15]

B. *Statute and Orders*—The question of what is a statute, within the meaning of the section, has been before the Court on many occasions. In eleven cases, a statute was directly challenged as unconstitutional. Six cases were held to challenge a statute within the meaning of the section. A state statute authorizing the appropriation of certain lands by designated condemnation proceedings, the enforcement of which by state officials was sought to be restrained as unconstitutional, by interlocutory injunction, was held, in an early decision,[16] to be within the section. The same result was reached in later cases, as to a state statute requiring all common carriers to obtain certificates from a state board,[17] a statute providing for a tax levy upon certain carriers,[18] another

[15]Ex parte Metropolitan Water Co., (1910) 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575.

[16]Ex parte Metropolitan Water Co., (1910) 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575. The state of Kansas passed an Act, in effect authorizing the summary appropriation of the lands affected by certain pending condemnation proceedings. The petitioner, a West Virginia corporation, commenced a suit to restrain a Kansas Drainage District from taking possession of its lands under the Act, upon the ground that the Act was unconstitutional. A single judge granted a temporary restraining order, but on the hearing for interlocutory injunction he refused to call in two other judges, ruling that: "the provisions of such section [Section 266] merely deprived a single judge of the power to grant a temporary [interlocutory?] injunction, and a court might be held by one judge for the purpose of decreeing the assailed statute to be constitutional." In reversing this decision, the Supreme Court said: "The suit being of the nature just stated, we are of the opinion that the provisions of the Act of Congress which are relied upon applied to the case, and that, as a result of their application, it imperatively follows, that the hearing and determination of the request for a temporary [interlocutory?] injunction should have been had before a court consisting of three judges, constituted by the mode specified in the statute."

[17]Clark v. Poor, (1927) 274 U. S. 554, 47 Sup. Ct. 702, 71 L. Ed. 1200. Plaintiffs contended that as carriers engaged exclusively in interstate commerce they could not constitutionally be required to apply for a certificate of convenience and necessity as required by the state statute, and sought to restrain state officials from enforcing the statute. An interlocutory injunction was granted, but on final hearing the statutory court denied a permanent injunction. The decision and the jurisdiction of the statutory court were affirmed on direct appeal.

[18]Interstate Busses Corp. v. Blodgett, (1928) 276 U. S. 245, 48 Sup. Ct. 230, 72 L. Ed. 551. Plaintiff corporation sought to restrain state tax officials from levying taxes uopn it pursuant to a state statute, upon the

state statute authorizing condemnation proceedings,[19] a statute requiring the payment by foreign railway corporations of certain minimum franchise taxes on business done within the state,[20] and a case where the single judge believed the matter would become moot.[21]

Five cases were held not to challenge a statute within the meaning of the section. Two of these were so decided merely because no interlocutory injunction was sought,[22] or because the application was abandoned.[23] In the other three cases, the attack was directed respectively against a city ordinance,[24] an assessment of a state equalization board,[25] and the enforcement of a statute by city officials,[26] rather than by state officers.

It would appear, therefore, that in order to be within the section, the plaintiff must challenge a legislative act of the state, on the ground of unconstitutionality, and plaintiff must seek to restrain its enforcement on behalf of the state, through action of officers of the state.

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ground that the statute was unconstitutional as interference with interstate commerce. The statutory court issued an interlocutory injunction, but, upon final hearing, dissolved it, and denied a permanent injunction. The decision and the court's jurisdiction were affirmed on direct appeal.

[19]Dohany v. Rogers, (1930) 281 U. S. 362, 50 Sup. Ct. 299, 74 L. Ed. 904.

[20]Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71.

[21]Ex parte Atlantic Coast Ry. Co., (1928) 279 U. S. 822, 49 Sup. Ct. 478, 73 L. Ed. 977.

[22]Ex parte The Public National Bank of New York, (1928) 278 U. S. 101, 49 Sup. Ct. 43, 73 L. Ed. 202.

[23]Hobbs v. Pollock, (1929) 280 U. S. 168, 50 Sup. Ct. 83, 74 L. Ed. 353. For the facts of this case, see footnote 12.

[24]Ex parte Collins, (1928) 277 U. S. 565, 48 Sup. Ct. 585, 72 L. Ed. 990. "The suit is not one to restrain the enforcement, operation, or execution of a statute of a state within the meaning of section 266. That section was intended to embrace . . . only those [cases] in which the object of the suit is to restrain the enforcement of a statute of general application or the order of a state board or commission. . . . It is municipal action, not the statute of a state, whose 'enforcement, operation or execution' the petitioner seeks to enjoin." See the Court's footnotes 2 and 3 in this case. For a case in which a local city ordinance was challenged, but properly not sought to be brought within the terms of the section, see City of Hammond v. Schappi Bus Lines, (1927) 275 U. S. 164, 48 Sup. Ct. 66, 72 L. Ed. 218, in which case a single judge granted an interlocutory injunction; appeal was taken to the circuit court of appeals, and subsequently from that court the case reached the Supreme Court.

[25]Ex parte Williams, (1928) 277 U. S. 267, 48 Sup. Ct. 523, 72 L. Ed. 877. A Nebraska statute provided for the assessment of railroad property by the state board of equalization. The Chicago, B. & Q. Ry. Co. sued the petitioner to enjoin the collection of taxes levied by the board upon the ground that the assessment was unconstitutional. An interlocutory injunction was sought. The single judge refused to call in two other judges,

Such legislative acts of the state are, of course, ordinarily statutes, duly enacted by the state legislature, approved by the governor, and followed by whatever other formality is required by state law. When such a state act is challenged as unconstitutional, the question whether or not a "statute" is challenged within the meaning of the section is relatively easy. A more troublesome question arises when an order of a state administrative board alone is challenged. An order or some other act of state officials is, of course, ordinarily involved in cases where only the statute is challenged, for until the statute is put into operation or attempted to be enforced and in some way affects the plaintiff, he cannot bring suit to restrain the enforcement of the statute. But a great number of the cases arise where there is no question of the constitutionality of the statute, which may not be challenged at all, or may be conceded to be valid. The controlling, if not the sole issue, in such cases, is the constitutionality of the order, without any reference to the statute. This class of cases has led to much litigation and Congress has made it the subject of special legislation, in the form of an amendment to the section. The validity of orders only, as distinguished from statutes, was questioned in nine cases under the section and in nine cases under the Urgent Deficiencies Act.

It has been seriously questioned, both before and after the amendment,[27] whether the section is intended to apply to such cases. But it would seem that on this point there no longer can be any doubt. The Supreme Court apparently has settled the question, in the following language:[28]

upon the ground that the case was not within the section. The Supreme Court refused mandamus to compel him to call the other judges, saying: "A case does not fall within section 266 unless a statute or order of an administrative board or commission is challenged as contrary to the federal constitution. . . . Here there was no question of the validity of the taxing statute. It was the assessment which the railroad challenged. And an assessment is not an order made by an administrative board or commission, within the meaning of that section. The function of the assessing board is not that of issuing orders. Its function is informational." For other cases involving assessments, see the Court's footnote 2, in this case. Cf. footnote 47.

[26]Ex parte The Public National Bank of New York, (1928) 278 U. S. 101, 49 Sup. Ct. 43, 73 L. Ed. 202. See also the discussion under "officers" infra; and for other cases involving officers, the Court's footnote 4 in Ex parte Collins, (1928) 277 U. S. 565, 48 Sup. Ct. 585, 72 L. Ed. 990, and the discussion on this point by the Court in United States v. Atlanta, B. & C. R. Co., (1931) 282 U. S. 522, 51 Sup. Ct. 237, 75 L. Ed. 349.

[27]The amendment referred to here and in the quotation from the Oklahoma Case following immediately in the text, is the Act of Mar. 4, 1913, ch. 160, 37 Stat. 1013. For the full text of the section, see footnote 2.

"A doubt has been suggested whether these cases are within section 266 of the Judicial Code. . . . The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a state, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of such statute' the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state' but did not change the statement of the ground, which still reads 'the unconstitutionality of such statute.' So if the section is construed with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this court has assumed repeatedly that the section was to be taken more broadly. . . . The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous, as the original statute covered them. . . . But it plainly was intended to enlarge, not to restrict the law. We mention the matter simply to put it at rest."

Accordingly, the following cases have been held to be within the section. In none of them was there any question as to the validity of the statute, but only the order of a state administrative board was challenged: an order regulating carrier rates,[29] an order reducing such rates,[30] an order refusing a license to carry on a certain business,[31] an order excluding certain portions of a requested passenger bus route,[32] a threatened revocation of existing

[28]Oklahoma Nat. Gas Co. v. Russell, (1923) 261 U. S. 290, 43 Sup. Ct. 353, 67 L. Ed. 659.

[29]Ex parte Northern Pacific Ry. Co., (1929) 280 U. S. 142, 50 Sup. Ct. 70, 74 L. Ed. 233. See also Railroad Com'n of California v. Los Angeles Ry. Corp., (1929) 280 U. S. 145, 50 Sup. Ct. 71, 74 L. Ed. 234 (challenge of confiscatory rate order).

[30]Oklahoma Nat. Gas Co. v. Russell, (1923) 261 U. S. 290, 43 Sup. Ct. 353, 67 L. Ed. 659.

[31]Herkness v. Irion, (1928) 278 U. S. 92, 49 Sup. Ct. 40, 73 L. Ed. 198. Plaintiff applied to the Louisiana State Commissioner of Conservation for a permit to operate on his land the business of extracting carbon black from natural gas. The statute provided that such permit was necessary. The permit was refused. Plaintiff started business without the permit and brought this suit to restrain the commissioner from enforcing the penalty imposed by the statute for so operating, upon the ground that the refusal of the permit violated the due process clause of the federal constitution. Three judges heard the application for interlocutory injunction, and later denied an injunction and dismissed the bill for lack of jurisdiction. On direct appeal the Supreme Court reversed the decision as to the dismissal, saying: "As the bill challenged the validity under the federal constitution of an order of an administrative board of the state, the district court had jurisdiction under section 266 . . . and this court has jurisdiction on direct appeal."

[32]Grubb v. Public Util. Com'n of Ohio, (1930) 281 U. S. 470, 50 Sup. Ct. 374, 74 L. Ed. 972.

licenses to sell insurance,[33] and an order requiring a carrier to cease and desist from operating unless it applied for and received a certificate of convenience and necessity.[34]

It is not material that the order is within or beyond the authority of the board, commission, or officer,[35] or that the court may be disposed to regard the order as constitutional. Nor is it material even that the final adjudication establishes the order as constitutional.[36]

For purposes of federal jurisdiction only, and aside from the question whether, under the section, three judges are necessary, the challenge of an order for unconstitutionality invokes the jurisdiction of the federal courts.[37] In the three[38] cases held not within the section because no interlocutory injunction was sought, or be-

[33]Fidelity & Deposit Co. v. Tafoya, (1926) 270 U. S. 426, 46 Sup. Ct. 331, 70 L. Ed. 664. See also Palmetto Fire Insurance Co. v. Conn, (1927) 272 U. S. 295, 47 Sup. Ct. 88, 71 L. Ed. 243 (threat to revoke license of foreign insurance company to do local business), and Tyson Bros. & United Theatres Offices v. Banton, (1927) 273 U. S. 418, 47 Sup. Ct. 426, 71 L. Ed. 718.

[34]Ex parte Madden Bros. Inc., (1931) 283 U. S. 794, 807, 51 Sup. Ct. 645, 75 L. Ed. 865.

[35]Herkness v. Irion, (1928) 278 U. S. 92, 49 Sup. St. 40, 73 L. Ed. 198. See also City of Winchester v. Winchester Water Works Co., (1920) 251 U. S. 192, 40 Sup. Ct. 123, 64 L. Ed. 221; Bohler v. Calloway, (1925) 267 U. S. 479, 45 Sup. Ct. 431, 69 L. Ed. 745; Risty v. Chicago, R. I. & P. Ry. Co., (1926) 270 U. S. 378, 46 Sup. Ct. 236, 70 L. Ed. 641. In Home Tel. & Tel. Co. v. City of Los Angeles, (1913) 227 U. S. 278, 33 Sup. Ct. 312, 57 L. Ed. 510, the Court stated this principle as follows: ". . . for the purpose of enforcing the rights guaranteed by the amendment [U.S. const. 14th amendt.] when it is alleged that a state officer, in virtue of state power, is doing an act which, if permitted to be done, prima facie would violate the Amendment, the subject must be tested by assuming that the officer possessed power, if the act be one which there would not be opportunity to perform but for the possession of some state authority." Cf. City of Chicago v. Chicago Rapid Transit Co., (1931) 284 U. S. 577, 52 Sup. Ct. 2, 76 L. Ed. 501.

[36]"We find no expression or implication anywhere in the section justifying the assumption that there was an intention on the part of Congress that the single justice or judge to whom the application for the interlocutory injunction should be presented need not call to his assistance two other judges to pass upon the application, in the event that he was of the opinion that the claim of the unconstitutionality of the statute was untenable. On the contrary, the statute evidences the purpose of Congress that the application for the interlocutory injunction should be heard before the enlarged court, whether the claim of unconstitutionality be or be not meritorious, as the appeal allowed to this court is from an order denying as well as from an order granting an injunction." Ex parte Metropolitan Water Co., (1910) 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575.

[37]In re Budder, (1926) 271 U. S. 461, 46 Sup. Ct. 557, 70 L. Ed. 1036; Moore v. Fidelity & Deposit Co., (1926) 272 U. S. 317, 47 Sup. Ct. 105, 71 L. Ed. 273; Hobbs v. Pollock, (1929) 280 U. S. 168, 50 Sup. Ct. 83, 74 L. Ed. 353.

[38]See footnote 37.

cause the application for such relief was abandoned, there was nevertheless jurisdiction in the federal courts, and these courts retained the cases for final determination, without, however, any necessity for three judges. Thus, where the plaintiff complained that the statute under which the state board was operating was no longer in force, and that for that reason the board had no power to make the order challenged, federal jurisdiction was found;[39] where a state officer cancelled plaintiff's authorization to issue certain types of insurance contracts which the officer erroneously regarded as contrary to public policy, there was jurisdiction in the federal court;[40] and where an order affecting insurance rates was challenged, jurisdiction in the federal court was found.[41]

Under the Urgent Deficiencies Act, similar to section 266, orders of the Interstate Commerce Commission may also, by express provision, be challenged in the federal courts, without, of course, any regard to the validity of the legislation creating the commission and defining its powers and duties.

Of the nine cases in which orders were challenged under the section, two were held not within the section merely because no interlocutory injunction was sought in the one[42] case and because the prayer for such relief was abandoned in the other.[43] In the nine cases arising under the Urgent Deficiencies Act, involving orders of the Interstate Commerce Commission, the Supreme Court in four[44] cases discussed certain acts of the commission which had been challenged as "orders" and held that they were not orders within the meaning of the act, as follows: where the act of the commission was the certification to the treasury department of the amount due certain railroads on an accounting;[45] where the commission included in a certain report a statement of

[39]In re Buder, (1926) 271 U. S. 461, 46 Sup. Ct. 557, 70 L. Ed. 1036.

[40]Moore v. Fidelity & Deposit Co., (1926) 272 U. S. 317, 47 Sup. Ct. 105, 71 L. Ed. 273.

[41]Hobbs v. Pollock, (1929) 280 U. S. 168, 50 Sup. Ct. 83, 74 L. Ed. 353. See also Interstate Busses Corp. v. Blodgett, (1928) 276 U. S. 245, 48 Sup. Ct. 230, 72 L. Ed. 551, in which plaintiff sought to restrain the enforcement of a statute imposing a valid tax on busses used in interstate commerce.

[42]In re Buder, (1926) 271 U. S. 461, 46 Sup. Ct. 557, 70 L. Ed. 1036.

[43]Moore v. Fidelity & Deposit Co., (1926) 272 U. S. 317, 47 Sup. Ct. 105, 71 L. Ed. 273.

[44]See also, for case involving "assessment" under the section, which was held not an order, footnote 25.

[45]Great Northern Ry. Co. v. United States, (1928) 277 U. S. 172, 48 Sup. Ct. 466, 72 L. Ed. 838. This was an action by the railway company to annul certain certificates issued by the Interstate Commerce Commission, on

the amount due certain railroad companies;[46] where the commission made negative orders dismissing a bill brought by the plaintiff oil company to recover certain charges exacted by certain carriers;[47] and where the commission denied a permit to build.[48]

C. *Officers*—The question, who is an "officer of the state" within the meaning of the section, was before the court in the *Public National Bank Case,*[49] which case clearly holds that the

the ground that the certificates were "orders" and to restrain action by the government. The Supreme Court held that the certificates were not "orders," and stated: "There is in the certificates no direction, no word of command. They are the recital of a finding of fact."

[46]United States v. Atlanta, B. & C. R. Co., (1931) 282 U. S. 522, 51 Sup. Ct. 237, 75 L. Ed. 349. In this case a certain report of the Interstate Commerce Commission was challenged as being an unlawful "order." The ruling of the three-judge court that the report was an "order" was reversed on direct appeal, the Supreme Court saying: "The action here complained of is not in form an order. It is part of a report—an opinion as distinguished from a mandate. The distinction between an order and a report has been observed . . . for compelling reasons. . . . No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review."

[47]Standard Oil Co. v. United States, (1931) 283 U. S. 235, 51 Sup. Ct. 429, 75 L. Ed. 555. In this case the act of the Interstate Commerce Commission was its dismissal of plaintiff's bill brought before the commission to recover certain charges exacted of plaintiffs by certain carriers. Three judges were called and dismissed the bill. On direct appeal, the Supreme Court affirmed the dismissal below, stating that the action of the Commission was merely a negative one, and therefore, not an order within the meaning of the Urgent Deficiencies Act. The Court said: "The order . . . simply dismissed the complaint . . . It is plain that the order is negative both in form and effect . . . this language [referring to the provisions of the Urgent Deficiencies Act] was not intended to apply to purely negative orders. A negative order which denies relief without more compels nothing requiring enforcement, and contemplates no action susceptible of being stayed by an injunction or affected by a decree setting aside, annulling, or suspending the order." See footnote 113 for further matters covered by the opinion in this case.

[48]Piedmont & Northern Ry. Co. v. United States, (1930) 280 U. S. 469, 50 Sup. Ct, 192, 74 L. Ed. 551, a case quite similar to the Standard Oil Case, in footnote 47. For an analogous case, arising under section 266, see Ex parte Williams, (1928) 277 U. S. 267, 48 Sup. Ct. 523, 72 L. Ed. 877.

[49]Ex parte The Public National Bank of New York, (1928) 278 U. S. 101, 49 Sup. Ct. 43, 73 L. Ed. 202. Plaintiff bank sought to enjoin the defendant city officials from collecting taxes assessed against certain property owned by the bank, upon the ground that the state law authorizing the tax was invalid because in conflict with the 14th amendment. Although the tax was authorized by the statute, it was for the sole use of the city. The statutory court granted an interlocutory injunction, but at the final hearing, of its own motion, sent the case back for further proceedings to the single judge, upon the ground that the suit was against city officials acting solely for city purposes and that the suit therefore did not challenge "any officer of such state" within the meaning of the section. This was sustained by the Supreme Court, for the Court refused mandamus to compel the three judges to re-convene and to function in the case. See also footnote 136. For other cases involving "officers," see footnote 26.

officer whose acts are sought to be restrained must be a state officer or the section will not apply. This case would seem further to imply that it must appear that the officer is acting in his official capacity, on behalf of the state, and in furtherance of its business. The Court said:

"The persons sued are municipal officers, having no state functions to perform, but charged only with the duty of collecting and receiving taxes assessed by other city officials in no respect for the use of the state, but for and in behalf of the city alone."

For these reasons the section was held not to apply. Various other questions might be suggested in this connection.[50]

D. *Relief Sought.*—It may be repeated that the controlling element in these cases is the relief sought by the plaintiff.[51] The section applies if he demands and persists in demanding an interlocutory injunction which must be based upon the alleged violation of the federal constitution. The absence of a prayer for such relief or its abandonment is the controlling point in four of the cases, which accordingly were held to be not within the section, and hence three judges were not necessary.

2. What Restrictions Are Placed upon the Power of a Single Judge?

The filing of a bill of complaint which lies within the section invokes the jurisdiction of the statutory court at once. This is true by virtue of the provisions of the section, which are imperative, and three judges are necessary even though the statute or order challenged may ultimately be held constitutional;[52] and even though the court may be of the opinion that the act challenged is void because in excess of the officer's authority under the state statute, and hence, in the opinion of the trial court, the constitutionality of the statute is not material;[53] or where the court believes the question involved is or may become moot.[54] The section reads:

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[50]For example: what if the state officer is not acting in his official capacity? Or is not acting on behalf of the state? Suppose he is acting in behalf of a municipality? Or, what of a municipal officer acting in behalf of the state? See also footnote 126.

[51]See footnotes, 9 to 13 inclusive, and Brucker v. Fisher, (C.C.A. 6th Cir. 1931) 49 F. (2d) 759.

[52]See footnotes 13 and 36.

[53]See footnotes 31, 35, and 36.

[54]Ex parte Atlantic Coast Ry. Co., (1928) 279 U. S. 822, 49 Sup. Ct. 478, 73 L. Ed. 977, in which it is said: "Upon examination of the return to the rule to show cause, the court finds that the reason given by the re-

". . . no interlocutory injunction . . . shall be issued or granted . . . unless the application for the same . . . shall be heard and determined by three judges . . . and unless a majority of said judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice . . . or judge, he shall immediately call . . . two other judges. . . ."

It would seem from the language of the section, and from the decisions, that when a case falls within the section, it lies solely within the jurisdiction of three judges sitting as a district court, except for the express and limited function of a single judge hereinafter discussed. Since the jurisdiction of the statutory court of three judges is unlimited in cases within the section, such a court can make any disposition of the case. This alone would exclude any idea of similar jurisdiction of a single judge. The jurisdiction of the statutory court, so invoked, cannot be defeated by any act of a single judge.[55]

Under the terms of the original section, the Act of June 18, 1910, the three judges were required to hear the application for interlocutory injunction. Some question arose in practice as to whether this requirement extended to the final hearing and disposition of the case. An amendment to the section, passed in 1925, expressly so provides.[56]

So far as the wording of the section alone is concerned, it amounts to a grant of power to the statutory court and a with-

spondent, the district judge for the northern district of Florida, that the case is likely to become moot, are not sufficient to justify his failure, immediately upon application, to call to his assistance two other judges." Cf. Grubb v. Public Util. Com'n of Ohio, (1930) 281 U. S. 470, 50 Sup. Ct. 374, 74 L. Ed. 972, a case within the concurrent jurisdiction of both federal and state courts. After a three-judge federal district court had granted an interlocutory injunction, a suit was begun and terminated in the state court, in which suit the validity of the commission's order was sustained. The three judges then vacated their interlocutory injunction and dismissed the suit. On direct appeal, this action was affirmed. See footnote 2, for provisions of section 266 providing for holding in abeyance a suit under the section, pending litigation in the state courts. Cf. with these cases, the cases of Oklahoma Nat. Gas Co. v. Russell, (1923) 261 U. S. 290, 43 Sup. Ct. 353, 67 L. Ed. 659, and Fidelity & Deposit Co. v. Tafoya, (1926) 270 U. S. 426, 46 Sup. Ct. 331, 70 L. Ed. 664, and In re Buder, (1926) 271 U. S. 461, 46 Sup. Ct. 557, 70 L. Ed. 1036. Cf. United Drug Co. v. Graves, (D.C. Ala. 1929) 34 F. (2d) 808, in which it was held that a single judge could refuse to convene the statutory court, where he was of the opinion that the bill of complaint did not support the contention that the statute complained of was in conflict with the federal constitution or laws.

[55]See footnotes 5, 12, 16, 36 and text just preceding footnote 78. See also Ex parte Northern Pacific Ry. Co., (1929) 280 U. S. 142, 50 Sup. Ct. 70, 74 L. Ed. 233.

[56]The 1925 amendment is the last sentence in the present section. See footnote 2 for full text.

drawal of such power from the single judge. No limitation on the power of the three-judge court is found in the section, unless the requirement that the three judges all be present at the final hearing may be called a limitation.[57] Any restrictions on the power of the statutory court must be sought outside of the section. One such limitation is found in the *Virginian Railway Case*,[58] in which the Supreme Court announces a rule limiting the power of such court to grant a stay pending appeal from a final decree denying an injunction.

Probably the most important provision in the section is the restriction placed upon the powers of a single judge holding a district court, who is confronted with a bill of complaint lying within the section. The object of the section is clearly to restrict the power of such a single judge. All power to hear or determine an application for interlocutory injunction is expressly taken away in so many words. It is stated expressly that such relief can be granted only by a three-judge court. It is clear that a single

[57]Note also the provision in the section that no relief may be granted until after the notice and hearing provided by the section.

[58]Virginian Railway Co. v. United States, (1926) 272 U. S. 658, 47 Sup. Ct. 222, 71 L. Ed. 463: "An application to suspend the operation of the Commission's order pending an appeal from the final decree dismissing the bill on the merit calls for the exercise of discretion under circumstances essentially different from those which obtain when the application for a stay is made prior to a hearing of the application for an interlocutory injunction, or after the hearing thereon but before the decision. . . . To justify a stay pending an appeal from a final decree refusing an injunction additional facts must be shown. . . . It must appear either that the District Court entertains a serious doubt as to the correctness of its own decision or that the decision depends upon a question of law on which there is a conflict among the courts of the several circuits, or that some other special reason exists why the order of the commission ought not to be operative until its validity can be considered by this court." For other cases involving stays and the power to grant them pending appeal, see the following cases, in which the orders of the statutory court, granting such stays, were affirmed: Herkness v. Irion, (1928) 278 U. S. 92, 49 Sup. Ct. 40, 73 L. Ed. 198; Merchants Warehouse Co. v. United States, (1931) 283 U. S. 501, 51 Sup. Ct. 505, 75 L. Ed. 692. See also the Court's footnote No. 3 in Virginian Railway Co. v. United States, (1926) 272 U. S. 658, 47 Sup. Ct. 222, 71 L. Ed. 463, discussed supra. As to the power of the single judge to grant stays, see footnote 72 and text. See also Baltimore & O. R. Co. v. United States, (1929) 279 U. S. 781, 49 Sup. Ct. 492, 73 L. Ed. 954, in which the Supreme Court criticized the failure of the statutory court to make findings and reversed its action in refusing to award restitution of certain funds. See also, Railroad Commission v. Maxcy, (1930) 281 U. S. 82, 50 Sup. Ct. 228, 74 L. Ed. 717. Cf. Mitchell v. Penney Stores, (1931) 284 U. S. 576, 52 Sup. Ct. 27, 76 L. Ed. 500, in which the statutory court, without a written opinion, had granted an interlocutory injunction to be in effect until the final hearing. The state challenged this action of the court as being an abuse of discretion and appealed directly to the Supreme Court, which dismissed the appeal.

judge never can *grant* an interlocutory injunction in those cases which fall within the section.[59]

But can he *deny* such relief? This more vexatious question arises, if for no other reason, because the language of the section does not expressly deny this power to the single judge, and because, in practice, single judges often have attempted, directly or indirectly, to deny such relief.[60]

It is suggested that the answer to this question must be: No. This would seem to follow from the express denial of his power to *grant* such relief, and because the power to grant it is lodged exclusively in the statutory court of three judges. But other portions of the section have a bearing on this question. It is provided:

"Whenever such application as aforesaid is presented to a justice . . . or judge, he shall *immediately* call to his assistance to *hear and determine* the application . . . two other judges. The hearing shall be given precedence and shall be in every way expedited, and be assigned for hearing at the earliest practicable day after the expiration of the notice. . . . An appeal may be taken direct to the Supreme Court of the United States from the order granting *or denying* . . . an interlocutory injunction. . . . The requirement respecting the presence of three judges shall also apply to the final hearing in any suit . . . and direct appeal to the Supreme Court may be taken from a *final* decree granting *or denying* a permanent injunction in such suit."[61]

This language, considered with the balance of the section, and the object sought to be accomplished by Congress,[62] leads to the conclusion that the section was intended to withdraw from a single judge, sitting as a district court, the power to deny as well as the power to grant such relief. If this be not true, what necessity is there for the requirement that upon the filing of the bill the single

[59]Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Com'n, (1922) 260 U. S. 212, 43 Sup. Ct. 75, 67 L. Ed. 217.

[60]Ex parte Metropolitan Water Co., (1910) 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575; Ex parte Atlantic Coast Ry. Co., (1928) 279 U. S. 822, 49 Sup. Ct. 478, 73 L. Ed. 977; Ex parte Northern Pacific Ry. Co., (1929) 280 U. S. 142, 50 Sup. Ct. 70, 74 L. Ed. 233; Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71; Ex parte Madden Bros. Inc., (1931) 283 U. S. 794, 807, 51 Sup. Ct. 645, 75 L. Ed. 865.

[61]Italics ours. [Ed.]

[62]"Congress realized that in requiring the presence of three judges, of whom one must be a justice of this court, or a circuit judge, it was imposing a severe burden upon the federal courts. The burden was imposed because Congress deemed it unseemly that a single judge should have the power to suspend legislation enacted by a state." Ex parte Collins, (1928) 277 U. S. 565, 48 Sup. Ct. 585, 72 L. Ed. 990. See also footnote 5 and text.

judge "shall immediately" call in two other judges? Does "immediately" mean "at once," or is it to be construed to mean after some lapse of time, during which the single judge is unhampered in entertaining and acting upon applications for similar relief in other forms, or motions going to the merits or to the jurisdiction? The section requires that he call two other judges to his assistance to "hear and determine" the application. This cannot be construed to permit the single judge to determine alone, when he intends to deny the relief sought, any more than he can determine alone when he intends to grant the interlocutory injunction. In the face of this language,[63] is the calling of two other judges a matter of discretion of the single judge? May he require two other judges to come to his assistance when he regards the case difficult, and dispense with them when he thinks it easy?[64]

Again, what need is there to expedite the hearing before three judges, if the single judge is to be permitted to exercise their powers? There can be no question that Congress was well aware that the convening of the statutory court requires, and in practice always takes, much more time than is necessary to get action by a single judge. Congress not only knew this, but it suggested, recognized and provided for it expressly in the section. The desirability of having three judges pass on the questions raised was regarded so highly that Congress sought by the terms of the section to hasten the assembly of the statutory court, while still insisting upon the presence of three judges. It would appear from the language in some of the decided cases, moreover, that Congress may not have been averse to some slight delay, in order to prevent the too hasty or improvident granting of injunctions.[65] This appears also from the provision in the section[66] requiring the giving of notice to certain state officials and the provision that no

[63]For full text of section, see footnote 2. See also the discussion in Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71.

[64]See footnote 36; also, footnotes 52 to 54 inclusive.

[65]The wording of the section leaves no doubt that Congress was by provisions ex industria seeking to make interference by interlocutory injunction from a federal court with the enforcement of state legislation regularly enacted and in the course of execution, a matter of the adequate and the full deliberation which the presence of three judges . . . was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge . . ." Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Com'n, (1922) 260 U. S. 212, 43 Sup. Ct. 75, 67 L. Ed. 217.

[66]For full text see footnote 2. Observe the numerous provisions making for delay. See also footnote 67.

relief shall be granted by way of interlocutory or permanent injunction except after such notice[67] and hearing.

The language of the section expressly provides for a final hearing before three judges, and for direct appeal to the Supreme Court from the action of these judges, whether the injunction be granted or denied. But, if the suit may be terminated by a single judge, there would be no final hearing for three judges. Moreover, the direct appeal to the Supreme Court, which is the only method of review provided within the section, contemplates only action of three judges, and the right of appeal exists only from the action of three judges. There are no provisions whatever in the section for the review of the action of a single judge, and if the scope and purpose of the section are borne in mind, there is no need for such provision because any error of the single judge in the course of his acting on a prayer for a temporary restraining order can and will be reviewed by the statutory court, the assembling of which is expedited by the terms of the section. The conclusion would seem irresistible that it was not intended by Congress that a single judge would or could perform those functions which were of such importance as to require three judges and in which review by the highest court in the land was so expedited as provided by the section. It would be absurd to say that such review was unnecessary when one judge acted, but that it would be necessary when three judges acted, even though pursuant to the section one of the three judges was a circuit judge. It is submitted that there is nothing in the section or in the decisions which would suggest that Congress at any time intended or expected a single judge to perform the function which the section requires to be performed by three judges, or that the single judge could nullify the legislation by preventing action by the statutory court.[68]

It is clear, however, that even in cases within the section, and hence requiring three judges, a single judge, by express provisions of the section, may also function—that he may pass upon an application for a temporary restraining order. Moreover, in

[67]Cf. Webster v. Fall, (1925) 266 U. S. 507, 45 Sup. Ct. 148, 69 L. Ed. 411, in which the Supreme Court set aside the decisions below on the ground that the secretary of the interior had not been served with notice, although the assistant secretary had been so notified. This case was not brought under either section 266 or the Urgent Deficiencies Act, but was brought under section 2047 of the Revised Statutes.

[68]Cf. footnote 5.

actual practice, such relief may be and often is granted ex parte. The section provides:

". . . if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time *before* such hearing and determination of the application for an interlocutory injunction, but such restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction. . . ."[69]

It may be suggested that a temporary restraining order, granted by a single judge, especially if granted ex parte, is perhaps even more in the nature of hasty and improvident interference by the federal courts with the sovereign states than an interlocutory injunction granted by three judges after notice and hearing. But Congress must have been aware of the possibility of the existence of those circumstances in which irreparable injury to individuals in the bona fide exercise of rights guaranteed by the federal constitution might follow state action, and, while deprecating the "possible unnecessary conflict between federal and state authority,"[70] felt is necessary to protect the individual in the enjoyment of such rights. But since the three judges are seldom, if ever, immediately available, Congress has authorized the single judge to take temporary action, although such action is limited to the shortest time practicable in convening the statutory court.

Insofar as a motion for a temporary restraining order may be made before a single judge, it is indispensable that he shall have power to determine, in exercising his discretion in granting or denying such relief, whether for such purpose the suit is within the jurisdiction of the federal courts and whether the circumstances exhibited by the bill present those conditions contemplated as "irreparable loss or damage" within the meaning of the section. He may, and ordinarily would, pass incidentally on the good faith of plaintiff or its absence in bringing the suit and on the question whether or not a substantial claim of unconstitutionality is presented. Yet all these factors are weighed and passed upon by the single judge for one purpose only, that is, as the basis for granting or denying the temporary restraining order. An adverse decision by him on these questions can be used only to deny

[69]Italics ours. [Ed.]

[70]Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Com'n, (1922) 260 U. S. 212, 43 Sup. Ct. 75, 67 L. Ed. 217.

the temporary relief; it cannot affect the final disposition of the case, for such final disposition is solely within the power of the three-judge court. It might be said that in so passing on the application for a temporary restraining order, the single judge exercises only a sort of pre-delegated authority on behalf of the statutory court of which, in the usual course, he will be a member.

In defining the powers of a single judge in such matters the Supreme Court has aided Congress materially by construing the section in those cases in which the question of the applicability of the section was involved. From these decisions it would appear that the function and powers of the single judge are confined to the initial and limited act of passing on a prayer for a temporary restraining order and discharging the duty of calling two other judges. He may grant or deny such temporary order, but no more.[71] The language of the section in authorizing such action by the single judge does not confer or permit all of the ordinary powers of a court of equity, for, in the first place, such temporary relief can be granted only under the circumstances prescribed in the section, and, in the second place, such order, if granted, is limited as to time by the terms of the section rather than by the discretion of the single judge. The order can be effective only until the statutory court is convened, and when that court acts the restraining order ceases to be of any force or effect.

The significance of the provision that an order for temporary restraint can be made only before the hearing on the interlocutory injunction by the statutory court is found in the *Cumberland Case*,[72] in which a single judge, *after* the three-judge court had denied an interlocutory injunction, attempted to continue in effect the temporary restraining order which he had granted before the hearing by the three judges. His action in so continuing his order was held to be unauthorized and wholly void.

The power of the single judge would seem, therefore, to be confined to the one act of granting or denying a temporary re-

[71]Ex parte Metropolitan Water Co., (1910) 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575; Virginian Railway Co. v. United States, (1926) 272 U. S. 658, 47 Sup. Ct. 222, 71 L. Ed. 463; Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Com'n, (1922) 260 U. S. 212, 43 Sup. Ct. 75, 67 L. Ed. 217; Ex parte Northern Pacific Ry. Co., (1929) 20 U. S. 142, 50 Sup. Ct. 70, 74 L. Ed. 233; Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71; Ex parte Madden Bros., Inc., (1931) 283 U. S. 794, 807, 51 Sup. Ct. 645, 75 L. Ed. 865.

[72]Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Com'n, (1922) 260 U. S. 212, 43 Sup. Ct. 75, 67 L. Ed. 217. See also footnotes 5 and 36.

straining order. It has been held that he cannot do both successively, for, having granted such relief, he has been held to be without jurisdiction later to vacate, amend, or otherwise affect his order or to entertain any motion with respect to it.[73] It seems he gets no "second shot" at it; he may not even change his mind and set the order aside, since once he has acted, he is without jurisdiction.[74]

It has been held that a single judge, prior to the convening of the statutory court, cannot entertain or act upon a motion going to the merits.[75] Can he entertain and act on a motion going to the jurisdiction of the subject-matter? There has been no case, until the recent *Madden Case*[76] in which this question was squarely raised, and there is no adequate discussion of this question in the decisions to date. But on the basis of the case just mentioned and on principle, it is submitted that the proper and only answer to the foregoing question is: No. Since the question of jurisdiction is an essential element of the application for relief under the section in an equitable proceeding, and since the granting or, as indicated above, the denying of an interlocutory injunction is exclusively within the jurisdiction of the statutory court, it would seem that a single judge cannot act on a motion going to the jurisdiction. All the reasons indicated by the Supreme Court in holding that he may not pass on motions going to the merits apply with equal force, it is submitted, to deny the power to pass on motions going to the jurisdiction. Such a motion necessarily involves, in an equitable suit, a consideration of factors which are inseparable from the merits. In passing on such a motion, the

[73]See cases cited in footnote 71.

[74]See Ex parte Metropolitan Water Co., (1910) 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575; Ex parte Northern Pacific Ry. Co., (1929) 280 U. S. 142, 50 Sup. Ct. 70, 74 L. Ed. 233, and cases cited in footnote 71.

[75]Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Com'n, (1922) 260 U. S. 212, 43 Sup. Ct. 75, 67 L. Ed. 217; Ex parte Metropolitan Water Co., (1910) 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575; Ex parte Northern Pacific Ry. Co., (1919) 280 U. S. 142, 50 Sup. Ct. 70, 74 L. Ed. 233; Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71.

[76]Ex parte Madden Bros., Inc., (1931) 283 U. S. 794, 807, 51 Sup. Ct. 645, 75 L. Ed. 865. In this case an order of a state board was challenged as unconstitutional. A single judge granted a temporary restraining order. Later, another single judge entertained and allowed a motion to dismiss for lack of jurisdiction of the court. On mandamus proceedings, the single judge was reversed by the Supreme Court. It is to be regretted that in this case a memorandum opinion only was given. The result, however, would seem to have settled the question adversely to the existence of such power in the single judge.

court must determine whether the bill presents a sufficient showing for equitable relief, and this necessarily involves some consideration of the validity of the act challenged, a preliminary determination of the facts, and of the question of whether or not an adequate remedy at law is available.

It is obvious that a decision by the single judge that there is no jurisdiction would prevent the question of jurisdiction ever reaching the three-judge court, would prevent its determination of the application for interlocutory injunction, would dispose finally of the case, and would vacate any temporary restraining order previously issued. The effect of a decision on such a motion is identical with a decision on the merits and operates to substitute the action of the single judge for that of the three judges, and action by him and the circuit court of appeals for that of the statutory court and the Supreme Court.[77] There can be no distinction in principle or in effect between action of the single judge on the merits and his action on motions as to the jurisdiction.

When a case falls within the section, therefore, it is submitted that a single judge cannot defeat the jurisdiction of the statutory court or prevent determination by it of the questions presented, whether as to the relief sought, or as to the merits, or as to the jurisdiction. This is true regardless of the fact that a temporary restraining order is sought or is not sought, and, if sought, regardless of whether it is allowed or not; and regardless, further, of what motion is attempted to be brought before the judge, whether attacking the merits or the jurisdiction. In those cases where no temporary restraining order is sought, or where if sought it is denied, the single judge must, nevertheless, call in two other judges and leave to the statutory court the determination of the application for interlocutory injunction and the final disposition of the case. In such cases the state and its officers cannot be prejudiced by the necessity for waiting for the assembling of these judges, for there is no restraint upon the state. In those cases where the temporary restraint is sought and granted, the state is inconvenienced as little as possible because the convening of the statutory court is expedited and the restraint imposed by the single judge can operate only until the three judges assemble.[78]

[77]See Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71.

[78]See discussion supra, and footnotes 6, and 70 to 74, inclusive.

The action of a single judge was questioned and review sought in the Supreme Court in ten cases; once on direct appeal, where that remedy was held improper, the appeal being dismissed;[79] and ten[80] times on mandamus, in four[81] of which mandamus was denied, and in six the writ was granted. In addition, the single judge needlessly called in two other judges in two cases[82] both of which were properly referred back to him. In another case[83] the single judge called in two others who retained and determined the case finally, although one judge could and should have functioned alone, as the case was not within the section. However, this was held not error on the part of the three judges. To these cases might be added the four cases involving orders of the Interstate Commerce Commission, which were held not to be within the act. In all the cases in which a single judge functioned, including the ten cases in which review was sought in the Supreme Court, the single judge acted correctly four[84] times and erroneously thirteen[85] times.

[79]Moore v. Fidelity & Deposit Co., (1926) 272 U. S. 317, 47 Sup. Ct. 105, 71 L. Ed. 273.

[80]Ex parte Metropolitan Water Co., (1910) 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575; Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Com'n, (1922) 260 U. S. 212, 43 Sup. Ct. 75, 67 L. Ed. 217; in re Buder, (1926) 271 U. S. 461, 46 Sup. Ct. 557, 70 L. Ed. 1036; Ex parte Williams, (1928) 277 U. S. 267, 48 Sup. Ct. 523, 72 L. Ed. 877; Ex parte Collins, (1928) 277 U. S. 565, 48 Sup. Ct. 585, 72 L. Ed. 990; Ex parte Atlantic Coast Ry. Co., (1928) 279 U. S. 822, 49 Sup. Ct. 478, 73 L. Ed. 977; Ex parte Northern Pacific Ry. Co., (1929) 280 U. S. 142, 50 Sup. Ct. 70, 74 L. Ed. 233; Hobbs v. Pollock, (1929) 280 U. S. 168, 50 Sup. Ct. 83, 74 L. Ed. 353; Ex parte Madden Bros., Inc., (1931) 283 U. S. 807, 51 Sup. Ct. 645, 75 L. Ed. 865; and indirectly in Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71.

[81]In re Buder, (1926) 271 U. S. 461, 46 Sup. Ct. 557, 70 L. Ed. 1036; Ex parte Williams, (1928) 277 U. S. 267, 48 Sup. Ct. 523, 72 L. Ed. 877; Ex parte Collins, (1928) 277 U. S. 565, 48 Sup. Ct. 585, 72 L. Ed. 990; Hobbs v. Pollock, (1929) 280 U. S. 168, 50 Sup. Ct. 83, 74 L. Ed. 353.

[82]Ex parte Williams, (1928) 277 U. S. 267, 48 Sup. Ct. 523, 72 L. Ed. 877; Ex parte The Public National Bank of New York, (1928) 278 U. S. 101, 49 Sup. Ct. 43, 73 L. Ed. 202.

[83]Smith v. Wilson, (1927) 273 U. S. 388, 47 Sup. Ct. 385, 71 L. Ed. 699.

[84]That is, assuming that the dismissal of an appeal, or the denial of a writ of mandamus, is equivalent to holding that the lower court acted properly and reached a correct result. This is, however, not necessarily true. Suppose, for example, the lower court is wrong in the conclusion on the merits, yet, because the case is not within the section, direct appeal does not lie to the Supreme Court; the dismissal of the appeal or denial of a writ of mandamus would therefore establish only the inapplicability of the section. The resort of the Supreme Court rather than to the circuit court of appeals would be the precise reason for the action of dismissing or denying by the Supreme Court. The correctness or error of the lower court's decision on the merits might but ordinarily would not be passed

The action of the statutory three-judge court was questioned and review sought in the Supreme Court in nineteen cases, ten[80] under the section, and nine under the act. Of the ten cases under the section, review was sought by direct appeal to the Supreme Court in eight cases, five[87] of which were affirmed or the appeal

upon (see footnote 137) by the Supreme Court (Cf. footnotes 107 and 120) and would be left for review and correction by the court having jurisdiction of the appeal, viz., the circuit court of appeals. See also footnotes 79 and 81.

[85]Ex parte Metropolitan Water Co., (1910) 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575; Cumberland Tel. & Tel. Co. v. Louisiana Pub. Serv. Com'n, (1922) 260 U. S. 212, 43 Sup. Ct. 75, 67 L. Ed. 217; Smith v. Wilson, (1927) 273 U. S. 388, 47 Sup. Ct. 385, 71 L. Ed. 699; Ex parte Williams, (1928) 277 U. S. 267, 48 Sup. Ct. 523, 72 L. Ed. 877; Ex parte The Public National Bank of New York, (1928) 278 U. S. 101, 49 Sup. Ct. 43, 73 L. Ed. 202; Ex parte Atlantic Coast Ry. Co., (1928) 279 U. S. 822, 49 Sup. Ct. 478, 73 L. Ed. 977; Ex parte Northern Pacific Ry. Co., (1929) 280 U. S. 142, 50 Sup. Ct. 70, 74 L. Ed. 233; Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71; Ex parte Madden Bros., Inc., (1931) 283 U. S. 807, 51 Sup. Ct. 645, 75 L. Ed. 865. And under the Urgent Deficiencies Act: Great Northern Ry. Co. v. United States, (1928) 277 U. S. 172, 48 Sup. Ct. 466, 72 L. Ed. 838; United States v. Atlantic, B. & C. R. Co., (1931) 282 U. S. 522, 51 Sup. Ct. 237, 75 L. Ed. 349; Standard Oil Co. v United States, (1931) 283 U. S. 235, 51 Sup. Ct. 429, 75 L. Ed. 555; Piedmont & Northern Ry. Co. v. United States, (1930) 280 U. S. 469, 50 Sup. Ct. 192, 74 L. Ed. 551. On the question of "error," see text at footnotes 113 and 127.

[86]Oklahoma Nat. Gas Co. v. Russell, (1923) 261 U. S. 290, 43 Sup. Ct. 353, 67 L. Ed. 659; Fidelity & Deposit Co. v. Tafoya, (1926) 270 U. S. 426, 46 Sup. Ct. 331, 70 L. Ed. 664; Smith v. Wilson, (1927) 273 U. S. 388, 47 Sup. Ct. 385, 71 L. Ed. 699; Clark v. Poor, (1927) 274 U. S. 554, 47 Sup. Ct. 702, 71 L. Ed. 1200; Interstate Busses Corp. v. Blodgett, (1928) 276 U. S. 245, 48 Sup. Ct. 230, 72 L. Ed. 551; Ex parte Williams, (1928) 277 U. S. 267, 48 Sup. Ct. 523, 72 L. Ed. 877; Herkness v. Irion, (1928) 278 U. S. 92, 49 Sup. Ct. 40, 73 L. Ed. 198; Ex parte The Public National Bank of New York, (1928) 278 U. S. 101, 49 Sup. Ct. 43, 73 L. Ed. 202; Dohany v. Rogers, (1930) 281 U. S. 362, 50 Sup. Ct. 299, 74 L. Ed. 904; Grubb v. Public Util. Com'n of Ohio, (1930) 281 U. S. 470, 50 Sup. Ct. 374, 74 L. Ed. 972. For an additional case see Ohio Oil Co. v. Conway, (1929) 279 U. S. 813, 49 Sup. Ct. 256, 73 L. Ed. 972, in which the Supreme Court reversed the statutory court which had denied an interlocutory injunction. The Supreme Court announced the broad rule covering such situations as follows: "Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted." Cf. Northport Power & Light Co. v. Hartley, (1931) 283 U. S. 568, 51 Sup. Ct. 581, 75 L. Ed. 811.

[87]Dismissal: Smith v. Wilson, (1927) 273 U. S. 388, 47 Sup. Ct. 385, 71 L. Ed. 699; cases affirmed: Clark v. Poor, (1927) 274 U. S. 554, 47 Sup. Ct. 702, 71 L. Ed. 1200; Interstate Busses Corp. v. Blodgett, (1928) 276 U. S. 245, 48 Sup. Ct. 230, 72 L. Ed. 551; Dohany v. Rogers, (1930) 281 U. S. 362, 50 Sup. Ct. 299, 74 L. Ed. 904; Grubb v. Public Util. Com'n of Ohio, (1930) 281 U. S. 470, 50 Sup. Ct. 374, 74 L. Ed. 972. As to the possible interpretation of a dismissal of an appeal, see footnote 84.

dismissed, and three[88] were reversed. Mandamus was used once[89] against the statutory court and denied. In the nine cases under the act, the three-judge court was affirmed five[90] times, and reversed four.[91] The three judges, therefore, acted correctly twelve[92] times and erroneously seven[93] times. It may be noted that this court properly referred two[94] cases back to the single judge, but erroneously failed to do so in a third case.[95] These cases include the four in which three judges needlessly functioned, because the cases were held not to be within the act.

The circuit court of appeals acted once[96] in a case within section 266 and, although it reached the correct result, was held to have acted without jurisdiction. The case was remanded to the circuit court by the Supreme Court with directions to dismiss for lack of jurdisdiction.

The action of the lower federal courts in the twenty-nine cases, including the circuit court of appeals, the statutory three-judge

[88]Oklahoma Nat. Gas Co. v. Russell, (1923) 261 U. S. 290, 43 Sup. Ct. 353, 67 L. Ed. 659; Fidelity & Deposit Co. v. Tafoya, (1926) 270 U. S. 426, 46 Sup. Ct. 331, 70 L. Ed. 664; Herkness v. Irion, (1928) 278 U. S. 92, 49 Sup. Ct. 40, 73 L. Ed. 198.

[89]Ex parte The Public National Bank of New York, (1928) 278 U. S. 101, 49 Sup. Ct. 43, 73 L. Ed. 202.

[90]Great Northern Ry. Co. v. United States, (1928) 277 U. S. 172, 48 Sup. Ct. 466, 72 L. Ed. 838; Standard Oil Co. v. United States, (1931) 283 U. S. 235, 51 Sup. Ct. 429, 75 L. Ed. 555; Merchants Warehouse Co. v. United States, (1931) 283 U. S. 501, 51 Sup. Ct. 505, 75 L. Ed. 692; Georgia Pub. Serv. Com'n v. United States, (1931) 283 U. S. 765, 51 Sup. Ct. 619, 75 L. Ed. 821; State of Alabama v. United States, (1931) 283 U. S. 776, 51 Sup. Ct. 623, 75 L. Ed. 827.

[91]Virginian Railway Co. v. United States, (1926) 272 U. S. 658, 47 Sup. Ct. 222, 71 L. Ed. 463; United States v. Erie Ry. Co., (1929) 280 U. S. 98, 50 Sup. Ct. 51, 74 L. Ed. 187; Piedmont & Northern Ry. v. United States, (1930) 280 U. S. 469, 50 Sup. Ct. 192, 74 L. Ed. 551; United States v. Atlanta, B. & C. R. Co., (1931) 282 U. S. 522, 51 Sup. Ct. 237, 75 L. Ed. 349.

[92]Five cases affirmed or appeal dismissed, see footnote 87. Two cases properly referred back to one judge, see footnote 82; all seven cases being under the section. Five cases under the Urgent Deficiencies Act, affirmed, see footnote 90. As to the effect of a dismissal, see footnote 84.

[93]Three reversals on direct appeal under the section, see footnote 88; and four under the act, see footnote 91. To these should be added the Wilson Case, in which three judges functioned needlessly, see footnotes 112, 127 and text.

[94]See footnote 82.

[95]See footnote 83.

[96]Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71. That is, once in those cases which reached the Supreme Court. For a case within the section which was appealed to the circuit court of appeals from a final decree of permanent injunction granted by the statutory three-judge court, see Brucker v. Fisher, (C.C.A. 6th Cir. 1931) 49 F. (2d) 759. The appeal was dismissed by the circuit court for lack of jurisdiction.

district court, and the district court as ordinarily constituted by one judge, was therefore correct in sixteen cases and erroneous in fourteen cases,[97] not including as errors those cases in which three judges functioned needlessly.

3. Review Provided in the Section

The only method of review provided within the section is direct appeal to the Supreme Court from the action of the statutory three-judge district court.[98] If the case falls within the section, three judges are necessary and have exclusive jurisdiction. The situation is that for which the expedited form of review is provided.

No provision for appeal, or for review in any manner, is made within the section for the situation where three judges should have been convened but were not.[99] Nor are there any provisions within the section for the review of the action of a single judge. The obvious reason is that a single judge never can take, in contemplation of the section, that action which may be taken only by three judges and for which the expedited form of review in the Supreme Court by direct appeal is provided. To the extent that a single judge may function in suits within the section, that is, in passing on prayers for temporary relief, no review is provided, nor is any necessary, for reasons discussed above. If the case falls within the section, the single judge is restricted to granting or denying any temporary relief requested and to discharging the duty of convening the statutory court. If for any reason the single judge refuses to call in the other two judges, or otherwise exceeds his powers under the section when three judges are not

[97]In the Stratton Case, (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71 two courts erred, viz: the circuit court of appeals and the single district judge. See also footnote 114 and text. As to the interpretation of a dismissal of an appeal or denial of mandamus by the Supreme Court, see footnote 84. As to the question of what action of the lower court is error, see footnotes 113, 127 and text.

[98]Moore v. Fidelity & Deposit Co., (1926) 272 U. S. 317, 47 Sup. Ct. 105, 71 L. Ed. 273; "The right [of direct appeal to the Supreme Court] exists only in cases falling within the provisions enumerated in that section [266] as amended. Otherwise the case must go in the first instance to the circuit court of appeals, and may come here only on review of that court's action."

[99]Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71. See also: Suncrest Lumber Co. v. Park Commission, (C.C.A. 4th Cir. 1928) 29 F. (2d) 823, and Crescent Mfg. Co. v. Wilson, (C.C.A. 2nd Cir. 1917) 242 Fed. 262, 265.

assembled, or after such court has assembled and functioned, the proper remedy is to petition the Supreme Court for a writ of mandamus directing the single judge to call in two other judges and/or to correct other error.[100]

If the case does not fall within the section, there is no necessity for the expedited form of review, and the decisions of the single judge, who may in such cases proceed in the ordinary course to full and final determination of the case, will be reviewed in due course, under other applicable statutes, in the circuit court of appeals. Thus, where no interlocutory injunction is sought, or where if originally sought it is abandoned, a single judge may decide the case on the merits,[101] and appeal may be taken, in the first instance, only to the circuit court of appeals.[102] The case may reach the Supreme Court only indirectly upon review of the action of the circuit court of appeals.

In the twenty-nine cases discussed herein only two forms of review were used to secure review by the Supreme Court, direct appeal and mandamus. The former was used in eighteen cases, nine under the section, and nine under the act. Under section 266, direct appeal was used improperly once[103] against a single judge, and once[104] against three judges, in both of which cases the appeal was dismissed. The other cases in which direct appeal was used were all against three judges, the procedure being held proper, although there were three reversals. Under the Urgent Deficiencies Act, all nine were appealed directly[105] from the action of three judges, although four cases were held not within the act.

Mandamus was used in eleven cases, all under the section. This

[100]Ex parte Metropolitan Water Co., (1910) 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575; Ex parte Northern Pacific Ry. Co., (1929) 280 U. S. 142, 50 Sup. Ct. 70, 74 L. Ed. 233; Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71; Ex parte Madden Bros., Inc., (1931) 283 U. S. 807, 51 Sup. Ct. 645, 75 L. Ed. 865. See also footnote 5.

[101]Moore v. Fidelity & Deposit Co., (1926) 272 U. S. 317, 47 Sup. Ct. 105, 71 L. Ed. 273; In re Buder, (1926) 271 U. S. 461, 46 Sup. Ct. 557, 70 L. Ed. 1036; Smith v. Wilson, (1927) 273 U. S. 388, 47 Sup. Ct. 385, 71 L. Ed. 699; Hobbs v. Pollock, (1929) 280 U. S. 168, 50 Sup. Ct. 83, 74 L. Ed. 353; and see also footnotes 9 to 13, inclusive. See also the language of the Court in the Stratton Case in footnotes 9 and 106. See also Public Serv. Com'n v. Batesville Tel. Co., (1931) 52 Sup. Ct. 1.

[102]See footnote 98, and Stratton Case, footnote 106.

[103]Moore v. Fidelity & Deposit Co., (1926) 272 U. S. 317, 47 Sup. Ct. 105, 71 L. Ed. 273.

[104]Smith v. Wilson, (1927) 273 U. S. 388, 47 Sup. Ct. 385, 71 L. Ed. 699.

[105]See footnote 1, as to review under the Urgent Deficiencies Act.

remedy was denied in a case in which it was attempted against three judges. It was denied in four cases in which it was attempted against a single judge. Mandamus was granted in six cases against a single judge.

The form of review is so closely dependent upon the question whether the section applies at all that it may be assumed that much of the current confusion as to the proper procedure results, undoubtedly, from confusion as to the applicability of the section. It is clear that if the section does apply and three judges do function, review in the Supreme Court lies by direct appeal, and that such direct appeal is the exclusive remedy. Mandamus will lie only where the remedy by appeal is not available.[100]

4. What Courts Have Jurisdiction of Cases Within the Section?

Where the case is within the section, and from the outset there is no question on this point, the further question, as to which courts have jurisdiction, is relatively simple. This is even more simple and obvious where in addition the subsequent course of the case is entirely within the letter and spirit of the section, in that the judges construe the section correctly as to their own powers thereunder and the decisions on the questions involved are also correct. But, in practice, the question of the applicability of the section may not be determined until final disposition of the case is announced by the Supreme Court. Moreover, the decisions of the courts cannot always be anticipated with that degree of certainty which will enable counsel to feel absolutely sure he is on the right track.

For the purpose of determining what courts have jurisdiction of a given case, it may be well to divide the twenty-nine cases discussed herein into two groups; one, including those cases held to be within the section or the Act; the other, the cases held not to be within it.

A. *Cases Within the Section.*—Under the provisions of the section, cases within it are solely within the exclusive jurisdiction of the federal district court constituted by three judges and of the Supreme Court, the former having exclusive original

[100] "This remedy (mandamus) would not be available if there were a remedy by appeal." Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71, in which the Court cites other cases on the point.

jurisdiction, the latter having exclusive appellate jurisdiction. The significant, although obvious, point is that the circuit court of appeals is necessarily eliminated from any and all jurisdiction of such cases. Only one[107] of the twenty-nine cases was brought to that court. This case came to the circuit court by appeals from an order of a district court of one judge which had dismissed the bill of complaint on the merits. The circuit court reversed the lower court. On appeal from this decision of the circuit court to the Supreme Court, the former was reversed with directions to dismiss the appeal from the district court for lack of jurisdiction of the circuit court. Inasmuch as the Supreme Court in the same proceeding, in effect, granted mandamus against the single district judge, by ordering him to vacate his order of dismissal and requiring him to call in two other judges in compliance with section 266, it is apparent that the circuit court's decision was correct on the merits but was error as an assumption of appellate jurisdiction which it did not have because the case was within the section.

The powers and duties of the district court with respect to cases within the section have been discussed above as well as the extent of its jurisdiction and the functions of the single judge and of the three judges. There has also been some discussion relative to the jurisdiction of the Supreme Court, but it is proposed to consider this point in greater detail. By express provision of the section and by judicial construction thereof, there is a condition precedent to the vesting of jurisdiction in such cases in the Supreme Court. Although, as has been stated, the Supreme Court has exclusive appellate jurisdiction, that jurisdiction under the section does not arise unless the action of three judges is the subject-matter of the appeal. The Court has itself imposed an additional requirement, namely, that such action by three judges

[107]Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71. See also footnote 83. Cf. action of the circuit court of appeals in a case not within either the section or the Urgent Deficiencies Act, but within section 238 of the Judicial Code, W. T. Waggoner Estate v. Wichita County, (1927) 273 U. S. 113, 47 Sup. Ct. 271, 71 L. Ed. 566, in which the Supreme Court held that the action of the circuit court of appeals was unauthorized and without jurisdiction because under section 238 review lay only by direct appeal to the Supreme Court. In this case too, the Supreme Court dispensed with needless formality and delay by determining the case rather than sending it back to the circuit court of appeals to be dismissed and then requiring the appellant to prosecute a new appeal to the Supreme Court. For other facts in this case, see footnote 112. For cases on similar action of the Supreme Court, see footnote 120.

must have been action which they could properly take.[108] It would seem, therefore, that direct appeal will not lie from the action of three judges who have needlessly functioned, and such appeal will not lie in any case to correct the action of a single judge.[109] Where three judges should have acted but did not because they were not convened or because the single judge attempted to dispose of the case, the jurisdiction of the Supreme Court may be invoked only by proceedings in mandamus directed against the single judge.[110] While the section provides only one method of review, that is, direct appeal to the Supreme Court, the jurisdiction of that Court may be invoked also by mandamus, a method arising from practical necessity and not allowed where the former remedy is available.[111]

B. *Cases not Within the Section.*—So far as Section 266 or the Urgent Deficiencies Act are concerned, in cases not within their provisions three judges are not necessary, and there is no jurisdiction in the Supreme Court on direct appeal from the district court.[112]

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[108]Moore v. Fidelity & Deposit Co., (1926) 272 U. S. 317, 47 Sup. Ct. 105, 71 L. Ed. 273; Smith v. Wilson, (1927) 273 U. S. 388, 47 Sup. Ct. 385, 71 L. Ed. 699; Ex parte The Public National Bank of New York, (1928) 278 U. S. 101, 49 Sup. Ct. 43, 73 L. Ed. 202; Hobbs v. Pollock, (1929) 280 U. S. 168, 50 Sup. Ct. 83, 74 L. Ed. 353; Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71. And under the Urgent Deficiencies Act: Great Northern Ry. Co. v. United States, (1928) 277 U. S. 172, 48 Sup. Ct. 466, 72 L. Ed. 838; United States v. Atlanta, B. & C. R. Co., (1931) 282 U. S. 522, 51 Sup. Ct. 237, 75 L. Ed. 349; Standard Oil Co. v. United States, (1931) 283 U. S. 235, 51 Sup. Ct. 429, 75 L. Ed. 555. In Moore v. Fidelity & Deposit Co. the Supreme Court of its own motion issued its rule to appellant to show cause why his direct appeal from a decree of permanent injunction issued by a single judge should not be dismissed for lack of jurisdiction in the Supreme Court. For further facts in this case, see footnote 98.

[109]Moore v. Fidelity & Deposit Co., (1926) 272 U. S. 317, 47 Sup. Ct. 105, 71 L. Ed. 273. See also Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71.

[110]See discussion infra and footnote 111. For the situation where three judges are convened but refuse to act in the case, see footnotes 129 to 131 inclusive and text.

[111]Stratton v. St. Louis, S. W. Ry. Co., (1930) 282 U. S. 10, 51 Sup. Ct. 8, 75 L. Ed. 71. See also footnotes 106 and 127.

[112]Smith v. Wilson, (1927) 273 U. S. 388, 47 Sup. Ct. 385, 71 L. Ed. 699. That is, jurisdiction under section 266 or under the Urgent Deficiencies Act. The Supreme Court may have jurisdiction of a case under other statutes, for example, under section 238 of the Judicial Code, which provided, before amendment, for direct appeal to the Supreme Court from the federal district courts, when the jurisdiction of the latter was invoked on constitutional questions. Such a case is W. T. Waggoner Estate v. Wichita County, (1927) 273 U. S. 113, 47 Sup. Ct. 271, 71 L. Ed. 566, in

5. Cases in Which the Application of the Section is Questioned

Cases in good faith claimed to be within the section may ultimately be held not to be within it. Since the application of the section is itself a question to be determined by the court and may

which the appeal was erroneously taken to the circuit court of appeals. In the review of that court's action, the Supreme Court said:

". . . The jurisdiction of the district court was invoked on the sole ground that substantial constitutional questions were involved. Hence a direct appeal should have been taken to this court. Judicial Code, section 238. . . . Having been erroneously brought to the circuit court of appeals, the case should have been transferred to this court. . . . But . . . the present appeal will operate effectively to lodge the case in this case for its decision, without the needless ceremony of remanding the case to the circuit court of appeals to enable that court to transfer it back to us for a second consideration." The same right of a direct appeal was allowed under section 238, in a criminal case, involving constitutional questions, in Salinger v. United States, (1927) 272 U. S. 542, 47 Sup. Ct. 173, 71 L. Ed. 398. See also footnotes 101 and 102 and text.

Section 238 of the Judicial Code, 28 U. S. C. A. sec. 345 and supplement, now reads as follows:

"Sec. 345. (Judicial Code, section 238, amended) Appellate jurisdiction from decrees of the United States district courts.—A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections or parts of sections, and not otherwise:

(1) Section 29 of Title 15, and section 45 of Title 49.

(2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

(3) Section 380 of this title.

(4) So much of sections 47 and 47a of this title as relate to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7. (Mar. 3, 1911, ch. 231, sec. 238, 36 Stat. 1157; Jan. 28, 1915, ch. 22, sec. 2, 38 Stat. 804; Feb. 13, 1925, ch. 229, sec. 1, 43 Stat. 938.)"

A brief analysis of the foregoing may be made as follows:

1. Subdiv. (1) above, comes within the Title of Commerce and Trade. Title 15 and section 29 thereof gives to the United States, when it is complainant in a suit thereunder, the right of direct appeal to the Supreme Court. The second reference in subd. (1) above comes within Title 49, Transportation, and section 45 thereof gives similar rights to the United States only.

2. Subdiv. (2) above comes within Title 18, Criminal Code and Criminal Procedure, and likewise gives the right of direct appeal only to the United States, under certain conditions involving questions of constitutional law. The Salinger Case, supra, was within this subdivision.

3. Subdiv. (3) above refers to section 266, being sec. 380 of Title 28, Judicial Code and Judiciary. See footnote 2.

4. Subdiv. (4) above, refers to the Urgent Deficiencies Act, also within this title, Title 28. See footnote 1.

5. Subdiv. (5) above, comes within the title Agriculture, Title 7, and section 217 thereof provides that the procedure to restrain orders of the Interstate Commerce Commission, under the Urgent Deficiencies Act, shall apply in suits to restrain orders of the Secretary of Agriculture, under

not be determined finally until settled by the Supreme Court, the plaintiff, in a given case, runs the risk of entering the wrong court or following the wrong procedure. The lower courts, too, may err for the same reason. Cases have been discussed above in which, for example, three judges have acted although the cases were held by the Supreme Court not to be within the section. There has been no decision by that Court squarely holding such action to be reversible error and without jurisdiction.[113] The five cases in which the statutory court functioned although the cases were held outside of the section were all appealed directly to the Supreme Court. In the first of these, the *Wilson Case*,[114] a state statute was challenged on the ground of its unconstitutionality, but no interlocutory injunction was sought by the plaintiff; three judges sat and entered a decree dismissing the bill. On direct appeal to the Supreme Court, the appeal was dismissed, but the Court expressly avoided a determination of the question whether such action of the statutory court was error, for the Court said:

"Here there was no application for an interlocutory injunction, and hence no necessity for a final hearing before three judges,

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the Packers and Stockyards Act. Tagg Bros. & Moorhead Case comes within this section. See footnote 1.

6. Prior to the amendment of Feb. 13, 1925, section 238 authorized direct appeal to the Supreme Court from the district courts, under Comp. Stat. 1215, 1215a, in cases where the jurisdiction of the district courts was invoked solely on the grounds that *state* legislation was invalid because in conflict with the federal constitution. The W. T. Waggoner Estate Case, (1927) 273 U. S. 388, 47 Sup. Ct. 385, 71 L. Ed. 699, was such a case, and although decided by the Supreme Court in 1927, had been started prior to the amendment. (Cf. Lemke v. Farmers' Grain Co., (1922) 258 U. S. 50, 42 Sup. Ct. 244, 66 L. Ed. 458, also before the amendment, in which the circuit court of appeals was held, however, to have jurisdiction of an appeal from the district court because in the case a *federal* statute was challenged.)

[113]Cf. Standard Oil Co. v. United States, (1931) 283 U. S. 235, 51 Sup. Ct. 429, 75 L. Ed. 555. (For the facts and other portions of the opinion of this case, see footnote 47.) On the question of the propriety of three judges acting in the case, the Court held that the suit was primarily for damages under the Interstate Commerce Act, rather than a suit under the Urgent Deficiencies Act to restrain the order of the Commission; that under the former, the plaintiff was given a choice between two non-cumulative remedies, one being a claim for damages before the Commission, the other being a suit for damages in the federal district court; that the plaintiff by presenting its claim before the commission made an election of remedies which barred it from suing in court. The Court said:

"It is hardly necessary to add, since section 9 [of the Interstate Commerce Act, 49 U.S.C.A. sec. 9] contemplates that the jurisdiction in such cases shall be exercised by the federal district court as ordinarily constituted, the specially constituted court is without jurisdiction to dispose of an action *under that section*, even if brought in the district court in the first instance." (Italics and matter in brackets, ours.)

[114]Smith v. Wilson, (1927) 273 U. S. 388, 47 Sup. Ct. 385, 71 L. Ed. 699.

although it may not have been error for three judges to sit, a question we do not find it necessary to decide. There is therefore no jurisdiction in this court to hear the appeal, which must accordingly be dismissed."

The rule of this case may be briefly stated as follows: in cases not within the section, appeal from the district court lies, in the first instance, exclusively in the circuit court of appeals. Or, stating the same rule from the viewpoint of the jurisdiction of the Supreme Court, there is no jurisdiction in the Supreme Court on direct appeal from the district court. The great majority[115] of the cases held not within the section are clearly in harmony with this rule. However, the application of the rule to actual cases is difficult. A modification, if not an outright exception, would seem to be necessary, based on whether or not the case is obviously within or without the section, and whether the final determination sustains the application of the section, and on the composition of the district court, whether one, or three judges.

It would seem that some modification of the rule has in fact been made in the four later cases, which otherwise would seem in conflict with it. If the rule, unmodified, means that the determination finally made on the applicability of the section by the Supreme Court should control the procedure below retroactively, the rule would be impossible in practice. And it might be said that the Supreme Court, itself, violated the rule in the four later cases[116] in which it exercised jurisdiction by affirming two cases[117] and reversing two cases[118] on direct appeal from the statutory three-judge district court, although the Supreme Court expressly held in the same cases that they were not within the Urgent Deficiencies Act. Under the rule of the *Wilson*, the *Moore* and

[115]In re Buder, (1926) 271 U. S. 461, 46 Sup. Ct. 557, 70 L. Ed. 1036; Moore v. Fidelity & Deposit Co., (1926) 272 U. S. 317, 47 Sup. Ct. 105, 71 L. Ed. 273; Smith v. Wilson, (1927) 273 U. S. 388, 47 Sup. Ct. 385, 71 L. Ed. 699; Ex parte Williams, (1928) 277 U. S. 267, 48 Sup. Ct. 523, 72 L. Ed. 877; Ex parte The Public National Bank of New York, (1928) 278 U. S. 101, 49 Sup. Ct. 43, 73 L. Ed. 202, Hobbs v. Pollock, (1929) 280 U. S. 168, 50 Sup. Ct. 83, 74 L. Ed. 353. Cf. Ex parte Collins, (1928) 277 U. S. 565, 48 Sup. Ct. 585, 72 L. Ed. 990.

[116]See text following footnote 127. Cf. Ex parte Collins, (1928) 277 U. S. 565, 48 Sup. Ct. 585, 72 L. Ed. 990, at footnote 127.

[117]Great Northern Ry. Co. v. United States, (1928) 277 U. S. 172, 48 Sup. Ct. 466, 72 L. Ed. 838; Standard Oil Co. v. United States, (1931) 283 U. S. 235, 51 Sup. Ct. 429, 75 L. Ed. 555.

[118]Piedmont & Northern Ry. Co. v. United States, (1930) 280 U. S. 469, 50 Sup. Ct. 192, 74 L. Ed. 551; United States v. Atlanta, B. & C. R. Co., (1931) 282 U. S. 522, 51 Sup. Ct. 237, 75 L. Ed. 349.

Collins Cases,[119] it would seem that the Supreme Court had no jurisdiction except for the purpose of dismissing the appeals and that the function of affirming or reversing the district court was within the exclusive jurisdiction of the circuit court of appeals.

This conclusion would be undeniable if in the four cases the Court had said that it was reversible error for three judges to act for any purpose in cases which the Supreme Court might later hold to be outside of the section and that in so acting they were wholly without any jurisdiction. It might be said, moreover, that the Supreme Court in reviewing the action below on direct appeal from the district court is itself acting inconsistently with the *Wilson*, the *Moore*, and *Collins Cases*[120] if not actually contradicting them. It might be said that such action by the Supreme Court would nullify other statutes regulating the appellate practice in the federal courts and would oust the Circuit Court of Appeals of its appellate jurisdiction; that the Supreme Court would be doing the work of the lower courts and would be adding to the confusion in the profession.

Can the cases be reconciled? The four cases were brought under the Urgent Deficiencies Act rather than under section 266, and for this reason, the question of jurisdiction[121] of the federal courts was not present. These cases may, perhaps, be distinguished further from the *Wilson*, the *Moore*, and *Collins Cases* for the reason that in the *Wilson Case* no interlocutory injunction

[119]Smith v. Wilson, (1927) 273 U. S. 388; 47 Sup. Ct. 385, 71 L. Ed. 699; Ex parte Collins, (1928) 277 U. S. 565, 48 Sup. Ct. 585, 72 L. Ed. 990 (for facts of this case, see footnote 24, and see also footnote 127); Moore v. Fidelity & Deposit Co., (1926) 272 U. S. 317, 47 Sup. Ct. 105, 71 L. Ed. 273, see footnote 108.

[120]See footnote 119. Another instance of the Supreme Court's dispensing with needless formality and defects in technical procedure in invoking its jurisdiction, is found in St. Louis & O'Fallon Ry. Co. v. United States, (1929) 279 U. S. 461, 49 Sup. Ct. 384, 73 L. Ed. 798, in which the Supreme Court vacated an order of the Interstate Commerce Commission instead of remanding the case to the statutory court with directions to vacate the order. See footnotes 98, 107, and 108.

[121]The four cases were brought under the Urgent Deficiencies Act to challenge action of the Interstate Commerce Commission, and therefore one important question always present in cases brought under section 266 was not present in the four cases, viz: the question of the jurisdiction of the federal courts, as such. In the four cases, the action of a federal commission was challenged in a federal tribunal. The decisive issue was whether or not the cases came within the special provisions of the Urgent Deficiencies Act, rather than under the ordinary statutes regulating the procedure in the federal courts. This question in turn depended upon whether the action challenged was or was not an "order" within the meaning of the special act.

was sought, and in the *Collins Case,* no state statute or order was challenged. This, it is submitted, is the controlling distinction, if any, because for the reason that such relief was not sought, the *Wilson Case* was *obviously* not within the section. Mere inspection of the bill of complaint, without reference to any other pleading or argument, would reveal the inapplicability of the section, whereas in the four cases such relief was sought and the decisive question was whether or not certain acts of the Interstate Commerce Commission were "orders" within the meaning of the Urgent Deficiencies Act. The answer to this question could not be given on mere inspection of the bill, or even on inspection of all the pleadings. The question was relatively more difficult and required considerable effort and a judicial determination after argument or brief on a fine question of law. Much the same sort of distinction which obtains in prescribing the method by which objections to defective pleadings may be presented, under the rules of the law of pleading, can be made here, namely, that where defects may be set up by demurrer when they appear on the face of a pleading, a defect not so appearing must usually be set up by a special plea. The basis for the rule of pleading applies to the present question. Where the case is obviously not within the section because no interlocutory injunction is sought, then the case will not be converted into one within the section merely because three judges are assembled and act thereon.[122] This would be true also in a case where that relief, although originally sought, was abandoned in open court either by withdrawal,[123] or by conceding the constitutionality of the statute or order challenged and seeking the relief on other and usual equitable grounds.[124] The situation in the four cases, on the other hand, presented a legal question for determination and required argument and brief as the basis for a judicial determination. The same may be said of the questions arising under the section, as to whether or not a "statute" or an "order" of an "officer" is involved.[125] In fact, all the vital questions upon which the application of the section or of the act de-

[122]See footnote 11.

[123]Moore v. Fidelity & Deposit Co., (1926) 272 U. S. 317, 47 Sup. Ct. 105, 71 L. Ed. 273; Hobbs v. Pollock, (1929) 280 U. S. 168, 50 Sup. Ct. 83, 74 L. Ed. 353.

[124]Hobbs v. Pollock (1929) 280 U. S. 168, 50 Sup. Ct. 83, 74 L. Ed. 353.

[125]See discussion above under headings "Statutes," "Orders," "Officers," etc.

pend fall within this category, as compared to the question whether or not an interlocutory injunction is sought.

It is suggested, therefore, that the modified rule to be taken from the decisions and, in particular, from the *Wilson* and perhaps, the *Collins Case,*[126] is that in cases *obviously* not within the section, there is no right of direct review by the Supreme Court either by direct appeal or mandamus. It is immaterial that three judges have acted in the case and that their action is sought to be reviewed. But, if the section is held inapplicable for any of the other involved reasons just mentioned, then, where three judges function as a district court, direct review of their action will lie in the Supreme Court. And it is immaterial that the decision of the three judges is that the section does not apply, or that the Supreme Court affirms or reverses such decision or determines for the first time the inapplicability of the section.[127] That is, it is immaterial for the purpose of jurisdiction and propriety of three judges acting in the case. On this basis, the cases are perhaps in harmony and not mutually inconsistent.

[126]See footnote 119. That is, that the decision of the Wilson Case is confined strictly to the facts then before the Court, a case in which no interlocutory injunction was sought. The Moore v. Fidelity & Deposit Co. Case would be in the same category because in that case the prayer for the interlocutory injunction was abandoned. The Collins Case is less clearly within the modified rule (see footnotes 24, 127 and text), for while the section applies only where a *statute* of a *state,* or order of a *state* board is challenged and when the *officer of such state* is sought to be restrained, and therefore it would seem patent on the face of a bill in which only an *ordinance* of a *municipality* was challenged or an *official of the municipality* was sought to be restrained that the section did not apply, yet several of the cases on this question have required a determination by the Supreme Court, as has been indicated in the discussion above. Moreover, the situation might arise in which a municipal ordinance was in fact passed in whole or in part for the benefit of the state, or is enforced for such purpose. The question of a municipal officer acting for the state either under a state statute or under a municipal ordinance has been suggested above (see footnote 50). However, the Collins Case may be said to be in harmony with the modified rule for, in the absence of the elements suggested, the situation would be that the bill did not on its face purport to come within the section. The elements which might invoke the applicability of the section would have to be set out in the bill, and without them the bill, using the analogous rule of pleading again, would be demurrable and therefore comes within the modified rule.

[127]In Ex parte Collins, (1928) 277 U.S. 565, 48 Sup. Ct. 585, 72 L. Ed. 990, a case held not within the section because a city ordinance and city officials only were sought to be restrained, the Court said:

"Mandamus is the appropriate remedy. Ex parte Metropolitan Water Co., 220 U. S. 539, 546, 31 Sup. Ct. 600, 55 L. Ed. 575, Ex parte Williams, 277 U. S. 267, 48 Sup. Ct. 523, 72 L. Ed. 877 decided May 14, 1928. But as we deem it clear that the case is not within the scope of Section 266, we deny leave to file the petition."

The rule, thus modified or understood, would provide for the circumstances and practical necessities arising in the course of litigation. The very fact that the question of the applicability of the section controls the procedure makes it necessary that the question be determined as soon as possible in a given case. The jurisdiction to determine that question, at least for the purpose of designating the proper tribunal, must be lodged somewhere, irrespective of the correctness or the outcome of such determination. Litigants ought not to be subjected to any uncertainty, delay, or expense which might be avoided by establishing definitely which court has such jurisdiction. Moreover, the three judges constituting the statutory court ought not be placed in the position of having acted without authority of law, or having committed reversible error, solely because the final decision by the Supreme Court in a given case holds that the section does not apply. The modified rule, indicated above, would avoid all these evils and make it clear that the statutory district court of three judges is and ought to be the court[128] to make the initial decision on the question of the application of the section with the right of review in the Supreme Court, with full power and jurisdiction in both courts to act for such purpose, regardless of the fact that the final decision may be that the case is not within the section.

Another question may arise where the three judges refuse to act and remand the case to a single judge. To illustrate the nature of this question, suppose counsel, in a given case, proceeds on the basis of his opinion that the case falls within the section, and three judges are assembled. At any stage in the proceedings, they may conclude that the section does not apply, and for that reason they may (a) remand the case to a single judge,[129] or (b) dismiss the bill,[130] or (c) deny the interlocutory or permanent injunction

[128]Because, if the section is found to apply, the statutory court would have exclusive jurisdiction (see text at footnote 107). This would exclude the ordinary district court of one judge as well as the circuit court of appeals. Under the general rule that the tribunal whose jurisdiction is invoked or is questioned is ordinarily the tribunal which determines, in the first instance, whether jurisdiction is present, it would seem that in proceedings under section 266 or under the Urgent Deficiencies Act, where the issue is whether jurisdiction of the statutory court is present, that such court should be and is the proper and only court to determine that question in the first instance. Specifically, neither the district court of one judge nor the circuit court of appeals should or can function in this respect.

[129]See footnote 82 and text.

[130]This disposition was made by the three judges in fifteen of the nineteen cases (see footnote 86). That is, in all of these cases, except the two cited in footnote 82, and in the two cases in footnote 118.

sought.[131] Does review of such action lie in the Supreme Court, or in the Circuit Court of Appeals? The situation presented when the bill is dismissed or the injunctive relief sought is denied[132] would seem to call for and allow review by direct appeal to the Supreme Court because the section expressly authorizes such review in cases where the relief is denied as well as in cases where it is allowed. This would not be true, of course, where the basis for the action of the three judges is the fact that no interlocutory injunction was sought. But where the action of the three judges takes the form of remanding the case to a single judge, the additional question arises whether this is an appealable order. If it is not, the question of which court has jurisdiction of an appeal is immaterial and superfluous. Will mandamus lie, and if so, in which court? Disregarding the case where no interlocutory injunction is sought, it is suggested that mandamus would lie in the Supreme Court. The alternative would be to ask for a rehearing by the three judges or to make a second request before the single judge to call in two other judges again. But this would be an idle gesture for all practical purposes.[133] Mandamus proceedings in the Supreme Court would be resorted to in the event that the single judge refused the second request. So the practical result would be mandamus proceedings in any event, the only difference being that after such second request the proceedings would be directed against the single judge rather than against the three judges. On the other hand, if the action of remanding may be construed, for the purpose of determining the question of the applicability of the section, as being in effect an appealable order, the procedure indicated above[134] would apply.

With respect to the tribunal, rather than to the method of appeal, it may be well to consider what steps may be taken. First, review in the circuit court of appeals might be sought. However, if the plaintiff is the aggrieved party, he must, to be consistent, abandon his request for an interlocutory injunction either by

[131]Smith v. Wilson (1927) 273 U. S. 388, 47 Sup. Ct. 385, 71 L. Ed. 699; Ex parte Williams, (1928) 277 U. S. 267, 48 Sup. Ct. 523, 72 L. Ed. 877.

[132]See footnote 136.

[133]The single judge would, under the circumstances, probably refuse to call two other judges for the second time. But if he did, they could remand the case again. In theory at least, this might go on indefinitely. For the situation where the single judge refuses to call in two other judges, see footnote 110 and text.

[134]See footnote 125 to 127, inclusive and text.

withdrawing it or by conceding the constitutionality of the statute or order challenged. Either party by such appeal must and does concede that the case is not within the section because if he insists that the section does apply he throws his own case out of the circuit court. If the case is found to be within the section, the circuit court of appeals would be without jurisdiction.[135] Mandamus in the circuit court of appeals by either party is even more obviously improper. The only other course open is to seek review in the Supreme Court either by direct appeal or by mandamus; the former on the ground, perhaps, that the action of the three judges in remanding the case is in effect a denial of the interlocutory and permanent injunction sought,[136] the latter, to compel the three judges to reconvene.

It is suggested that the last step is the proper one and should be available in all cases where the statutory court remands the case to a single judge, except where the section is obviously inapplicable, as where no interlocutory injunction is sought. This procedure would eliminate delay and the futile second request before the single judge to call in two other judges. It would eliminate much of the delay and expense involved in an appeal, and such saving is especially desirable where, as in such proceedings, the merits[137] of the case have not been adequately considered. It would authoritatively settle the question of the application of the section, and it would settle the question of procedure. This procedure was followed in the *Public National Bank Case*,[138] in which the plaintiff, after the statutory court had remanded the case to a single judge, petitioned the Supreme Court for a writ of

[135]See footnote 96 and text.

[136]This course was followed in many of the cases. For a typical case, see Ex parte The Public National Bank of New York, (1928) 278 U. S. 101, 49 Sup. Ct. 43, 73 L. Ed. 202. See also Grubb v. Public Util. Comm'n of Ohio, (1930) 281 U. S. 470, 50 Sup. Ct. 374, 74 L. Ed. 972; Alexander Sprunt & Son v. United States, (1930) 281 U. S. 249, 50 Sup. Ct. 315, 74 L. Ed. 832.

[137]That the merits will not be considered by the Supreme Court on review of action of the lower courts on interlocutory injunction, unless accompanied by other action disposing finally of the case, see State of Alabama v. United States, (1929) 279 U. S. 229, 49 Sup. Ct. 266, 73 L. Ed. 675.

[138]Ex parte The Public National Bank of New York, (1928) 278 U. S. 101, 49 Sup. Ct. 43, 73 L. Ed. 202. For the facts of this case, see footnote 49. Cf. Ex parte Collins, (1928) 277 U. S. 565, 48 Sup. Ct. 585, 72 L. Ed. 990, footnote 127, which was a proceeding against a single judge only, and compare, Ex parte Williams, (1928) 277 U. S. 267, 48 Sup. Ct. 523, 72 L. Ed. 877, footnote 25.

mandamus against the three judges to compel them to reconvene. The writ was denied on the ground that since city officials only were sought to be restrained rather than "officers of a state," the case was not within the section, and hence three judges were not necessary. With the soundness of the decision there can be no quarrel. The procedure is equally sound for it was the means of having settled the question of the application of the section.

SUMMARY

In practice, the troublesome question which arises first is whether a given case falls within the section. The correct answer to this question almost automatically will take care of the incidental questions of which court is the proper one, when three judges are necessary, the powers of a single judge, and the procedure for review. The controlling question is difficult and technical and has been the decisive issue in many of the cases in which the question was not settled until the final determination of the Supreme Court. It is suggested that in arriving at a decision on this question counsel may well analyze the facts of his case, with a view to determining the following questions:

1. Is a legislative act of a state challenged and its "enforcement, operation, or execution" sought to be restrained by interlocutory injunction in the federal court?
2. Is "any officer of such state" sought to be restrained in such enforcement, operation, or execution?
3. Is the legislative act of the state (a) a "state statute" or (b) "an order made by an administrative board or commission acting under and pursuant to the statutes of such state?"
4. Is the statute or order challenged on the ground of its unconstitutionality under the federal constitution or laws?
5. Is an "interlocutory injunction" sought, and if so, is it pressed?

Perhaps question 5 should be considered first because it is easiest to answer, and if such answer be in the negative, there can be no question that the case does not fall within the section, and any further inquiry is needless.

Briefly, if an affirmative answer properly is made to all of these questions, the suit will fall within the section, and three judges are necessary for all decisions other than a prayer for a temporary restraining order. If the answer to any one of these questions is properly in the negative, the suit is not within the section, and the single judge has full power to act.